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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 701

BENDIX AVIATION CORPORATION,

Appellant,

vs.

INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF INDIANA.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the Supreme Court of Indiana is not yet officially reported but is found, unofficially, in 143 N. E. (2d) 91, and hereinafter as Appendix "A". This Appellant's petition for rehearing was denied without opinion. The opinion of the trial court is reproduced hereinafter as Appendix "B".

JURISDICTION.

This appeal is from a final order of the Supreme Court of Indiana reversing the trial court, St. Joseph Superior Court No. 1, and directing it to enter judgment for the Appellee herein in a statutory action brought by Appel-

lant for the refund of certain gross income taxes demanded by and paid to Appellee by the Appellant. The action for refund was brought pursuant to the provisions of Indiana Acts of 1933, Chapter 50, § 14, as amended (Burns' Indiana Statutes Annotated 1933 [1951 Replacement Vol. 11, Part 2] § 64-2614) and upon the ground that the taxes sough to be recovered were levied in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

Final judgment of the Supreme Court of Indiana was issued June 5, 1957. On June 21, 1957, this Appellant filed a petition for rehearing, pursuant to Rule 2-22 of the Rules of the Supreme Court of Indiana. On September 9, 1957, the petition was denied without opinion. The Notice of Appeal was filed in the Supreme Court of Indiana on the 8th day of November, 1957.

The jurisdiction of this Court to review the judgment of the Supreme Court of Indiana on direct appeal is conferred by 28 U. S. C. § 1257 (2) and is sustained by the following decisions:

J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307; 58 S. Ct. 913

International Harvester Co. v. *Department of Treasury*, 322 U. S. 340; 64 S. Ct. 1019; 322 U. S. 349; 64 S. Ct. 1030.

Freeman v. *Hewit*, 329 U. S. 249; 67 S. Ct. 274.

Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 434; 59 S. Ct. 325.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282; 42 S. Ct. 106.

STATUTES INVOLVED.

The Statute of Indiana involved in this appeal is Indiana Acts of 1933, Chapter 50, Section 2, Page 390, as amended Acts of 1937, Chapter 117, Section 2, Page 604, and Section 6, Page 392, as amended Acts of 1937, Chapter 117, Section 6, Page 604 (Burns' Indiana Statutes Annotated 1933 [1951 Replacement Vol. 11, Part 2] § 64-2602 and § 64-2606). Section 2 reads as follows:

> "There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities * * *."

The relevant portions of Section 6 read as follows:

> "Exemptions.—There shall be excepted from the gross income taxable under this act:
>
> (a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the state of Indiana is prohibited from taxing such gross income by the Constitution of the United States by America. * * *"

The Supreme Court of Indiana held that Article I, Section 8, Clause 3, of the Constitution of the United States

(hereinafter called the Commerce Clause), did not prohibit taxation by Indiana of the gross receipts arising out of the performance of the contracts upon which this action was based.

QUESTIONS PRESENTED.

The questions themselves appear here as originally set forth in the Notice of Appeal. The explanatory portion preceding the questions is revised.

All of the gross receipts taxed by the Appellee herein (hereinafter sometimes called "the State") arose out of the performance of contracts between Appellant as a prime contractor and the United States of America, or from contracts between Appellant as a sub-contractor and out-of-state corporations, each of which was a prime contractor with the United States. With respect to all of the contracts, the fact situation appears to fall directly under the rule of *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; 58 S. Ct. 913, and *Freeman* v. *Hewit*, 329 U. S. 249; 67 S. Ct. 274, unless the protection of the Commerce Clause does not extend to gross receipts from transactions in which the seller has

> (a) made delivery of the manufactured items at the seller's expense and by seller's equipment and employees free on board the equipment of a common carrier at a point in the state of origin for immediate transportation to a destination outside the state of origin, and
>
> (b) shipment is made on Government bills of lading.

These two elements of fact are true with respect to all of the contracts including both those in which Appellant acted as a prime contractor and those in which Appellant acted as a sub-contractor. The other elements of fact upon which the Appellee had relied, severally and in every

combination, apply to less than all of the contracts, but present, severally and in combination, unique and knotty problems.

The principal questions presented are:

1. Whether the gross receipts from the above described transactions are taxable because delivery was made f. o. b. a common carrier at an Indiana point and shipment was on a Government bill of lading?

2. Assuming Question 1 is answered in the negative, then as to contracts in which Bendix is a prime contractor with the United States, whether the addition of the particular "inspection and acceptance" provision of the contracts, or the fixing of the out-of-state destination by a direction given substantially in advance of shipment under contractual right, rather than in the contract itself, or the making of a partial payment which contractually passes title to the United States, until the payment is recaptured on succeeding invoices when title revests in Bendix, or any combination of any of these additions make the gross receipts from the above described transactions taxable?

3. Assuming Question 1 is answered in the negative, then as to contracts in which Bendix is a sub-contractor to a prime contractor with the United States, whether the addition of contractual inspection and acceptance arrangement where inspection and acceptance was actually made in Indiana by inspectors of the United States, but the prime contractor reserved by contract the right to accept or reject the goods outside of Indiana, make the gross receipts from the above described transactions taxable?

STATEMENT OF THE CASE.

The Appellant, Bendix Aviation Corporation (hereinafter sometimes referred to as "Bendix") is a Delaware Corporation, qualified and admitted to do business in Indiana, with a manufacturing plant at South Bend, St. Joseph County, Indiana, at which all the goods involved in the transactions out of which this case arises were made.

The transactions which produced the gross receipts involved in this appeal arose from two (2) general kinds of contracts:

(a) Contracts between Bendix as a prime contractor and the United States of America;

(b) Contracts between Bendix as a sub-contractor and out-of-state corporations, each of which was a prime contractor for the United States of America.

All of the contracts were negotiated and executed outside of Indiana. All of the contracts called for the manufacture, sale, delivery and shipment by Bendix of certain items. All of the contracts required that delivery be made f. o. b. equipment of a common carrier at an Indiana point for shipment on Government bills of lading. All of the items were shipped to destinations outside of Indiana.

Up to December 27, 1950, the State had never claimed that gross income taxes were payable on gross receipts arising from transactions of the kind described. On that date by office memorandum the State announced that taxes would be levied on such gross receipts. The new ruling, originally intended to be retroactive to January 1, 1950, was modified so that the levy began on gross receipts from such transactions received on and after January 1, 1951. Bendix paid the taxes as demanded and on February 28, 1954, filed a claim for refund encompassing taxes paid on

gross receipts from such transactions between January 1, 1951, and September 30, 1953. The claim for refund was denied. Thereafter Bendix sued for recovery of the tax monies in accordance with Indiana statutory requirements, together with World War II Bonus Taxes which were payable under the same Statute for a portion of the period and which are not hereinafter separately identified.

The State's position at first was simply that gross receipts from all shipments made on Government bills of lading were taxable. In the State's letter denying the Bendix claim for refund (Tr. p. 17, ll. 25-7)[1] there is an acknowledgment that the claim for refund has been filed followed by these words:

> "Please be advised that the Division considers shipments made on Government Bills of Lading taxable in their entirety.
>
> "Therefore your Claim for Refund is denied."

How the Federal Questions Arose.

After denial of its claim for refund Bendix commenced suit June 2, 1954, and on March 21, 1955 filed an amended complaint upon which the cause was tried (Tr. p. 7, ll. 17 ff.). The amended complaint sought recovery of the taxes paid on the ground that the imposition of the tax was contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States (Tr. p. 9, l. 8—p. 11, l. 22). On the same day the State filed its answer to the amended complaint and established the issues by denying specifically Paragraphs 8, 9, 10 and 11 of the amended complaint, among others, which were the paragraphs setting forth the illegality of the tax under Article 1, Section 8, Clause 3 of the Constitution (Tr. p. 18, ll. 23-5).

1. References to the typewritten certified transcript of record will be shown so.

On April 25, 1955, the cause was submitted for trial and the parties by agreement filed a Stipulation of Facts, which was the only evidence submitted in the action (Tr. pp. 19, 38-102).

No question concerning the propriety of this Appellant's suit and no procedural questions were ever raised. The sole and single problem from the moment issue was joined to the time of denial of this Appellant's petition for rehearing in the Supreme Court of Indiana, was whether or not the State of Indiana was barred by Article I, Section 8, Clause 3 of the Constitution of the United States from levying and collecting this tax upon the particular gross receipts. In the opinion of the Trial Court (Appendix "B", p. xx) the Judge stated the contentions of the parties as follows:

> "Plaintiff contends that the transactions are interstate in nature so that they cannot be taxed under the Indiana Gross Income Tax Act.
>
> "Defendant contends that certain practices and contractual provisions between the plaintiff and the U. S. Government, or contractor of the U. S. Government, make each of the transactions involved intra-state, with only interstate attributes."

Before his direction that a form of judgment be prepared the Trial Judge concluded as follows (Appendix "B", p. xxiv):

> "In the opinion of this court, all the transactions here considered are interstate in nature and cannot be construed as intrastate with only interstate attributes. These transactions directly involve the great universal stream of commerce between the several states. It must be remembered that the Indiana Gross Income (*sic*) has expressly been determined to be a burden on interstate commerce and that if the Indiana Legislature wishes to tax transactions such as those

here involved it may at any time adopt a privilege tax and do so. It is not the duty of the court to establish the taxing policy of this state."

Judgment was entered for this Appellant on April 18, 1956 (Tr. pp. 30-1). Thereafter the State filed motion for a new trial assigning as its reasons that the decision of the Trial Court was not sustained by sufficient evidence and was contrary to law, which motion was overruled on the same date, April 20, 1956 (Tr. p. 31, l. 22—p. 33, l. 10). On same date the State filed its Praecipe of Transcript (Tr. p. 105), followed on July 3, 1956, by the tendering of its Bill of Exceptions which was approved (Tr. p. 33), and on July 18, 1956, the State filed its Transcript of Record with the Clerk of the Supreme Court of Indiana assigning as error the overruling of its motion for a new trial (Tr. p. 1).

In the State's brief filed in the Supreme Court of Indiana (excluding record references no longer applicable) the State said:

"WHAT THE ISSUES WERE.

"The issues were formed on appellee's amended complaint and appellant's answer of affirmation and denial. Appellee contends that the tax imposed upon its receipts from the sale of products to the United States Government and to its prime contractors on Government contracts where shipments were made on U. S. Government bills-of-lading to destinations outside the State of Indiana was illegal as a tax upon interstate commerce violating Clause 3 of Section 8, Article 1 of the U. S. Constitution, and contrary to Paragraph (a) of Section 6, Chapter 50 of the Acts of the Indiana General Assembly of 1933, as amended, the same being Section 64-2606, Paragraph (a) (Burns' Indiana Statutes Ann. (1953 Replacement)).

"Appellant denies these contentions by its answer."

In the opinion of the Supreme Court of Indiana at Appendix "A", p. iv, appear the following words:

> "It is appellee's contention that the receipts from all of these contracts are not subject to the gross income and bonus taxes of the State of Indiana for the reason that the State is prohibited from taxing such transactions under the Commerce Clause (Art. 1, § 8, Cl. 3), of the United States Constitution."

The pleadings, the briefs and the opinions of the Trial Court and of the Supreme Court of Indiana as well as Bendix' petition for rehearing (Tr. pp. 128-131) all combine to show that this Federal Constitutional question arose at the beginning of the case, remained the only issue in the case and was required to be and was decided by the Supreme Court of Indiana.

STATEMENT OF THE CASE.

(Resumed.)

The issue never changed; the argument of the State did, however, change, in part, in the appeal before the Supreme Court of Indiana.

Two contract requirements were true of all of the various agreements which produced the gross receipts:

> (a) All required delivery f. o. b. equipment of a common carrier in Indiana;
>
> (b) All required shipment to the out-of-state destinations on Government bills of lading.

In briefs and argument before the Trial Court, delivery f. o. b. equipment of a common carrier in Indiana was not treated by the State as indicative of a "local transaction," but was consistently accepted as falling within the rule of *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; 58 S. Ct. 913, and *Gross Income Tax Division* v. *Conkey*,

228 Indiana 352; 90 N. E. (2d) 805; cert. den. 340 U. S. 941; 71 S. Ct. 504.[2]

In its Reply Brief in the Supreme Court, the State introduced its argument to the effect that delivery f. o. b. common carrier in Indiana resulted in a "local transaction," unless the seller owed some obligation to see that delivery was actually made to the out-of-state destination.

It would be bootless to consider or evaluate the two points separately at this stage since the Supreme Court of Indiana combined them. Therefore, we treat of these points in combination as the basis of the State's justification of its refusal to make the refund and as the basis of the reasoning of the Supreme Court of Indiana through which it decided (Appendix "A", p. xvii):

> "Looking at these facts as a whole before us, the receipts resulted from transactions completely performed in Indiana. The performance was essentially local in character. The tax does not discriminate against interstate commerce nor does it interfere with the grant of power of Congress to regulate commerce among the several states."

It would be pleasant to be able to say that the foregoing constitutes an adequate statement of the case. There are a certain number of complicating factors which must find expression here, as they have found expression in Questions 2 and 3 of the "Questions Presented."

Those contracts in which Bendix performed as a prime contractor for the United States of America included provisions with respect to "inspection and acceptance," which the State contended brought the gross receipts derived

2. Certiorari was sought in the *Conkey* case by the State of Indiana as to that portion of the decision of the Supreme Court of Indiana which found that delivery f. o. b. an Indiana point for shipment to an out-of-state destination was an interstate movement and that the gross receipts arising from these transactions were not taxable under the Federal Constitution.

from such contracts under the rule of *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62; 61 S. Ct. 885. Appellant's position with respect to these "inspection and acceptance" provisions was simply that they extended to quantity and quality only and that the specific requirement of delivery on board a common carrier with shipping papers showing an out-of-state destination made the application of the *Wood Preserving* case wholly improper. The Trial Court ruled for Appellant on this point (Appendix "B", p. xxi).

The State also contended that in those instances in which advance payments were made by the United States to Bendix as a prime contractor under the "partial payment" provisions of a contract, Bendix became a bailee performing special services rather than a manufacturer making and selling goods. The contract provided that when monies were advanced, title to the raw materials, partially finished and finished goods forthwith vested in the United States and with equal immediacy revested in Bendix as the advanced monies were repaid in accordance with a contract formula. The Appellant contended that the passage of title was a minor incident in a larger transaction constituting a special arrangement between the parties and wholly unrelated to the nature of the transaction. The Trial Court ruled for Appellant on this point (Appendix "B", p. xxiii).

As we have stated all of the goods, the manufacture, delivery and shipment of which resulted in the gross receipts taxed went to destinations outside of Indiana. In some of the prime contracts between Bendix and the United States the destinations of all of the goods were directly set forth. In some of the contracts the destinations of some of the items to be manufactured were set forth and the remaining items were to be shipped to destinations which the parties agreed the United States might, in writ-

ing, fix at a date after the execution of the contract but substantially before the time of shipment. The State contended that the use of the shipping instruction arrangement meant that the parties did not contemplate a transaction in interstate commerce, since the shipping instructions might provide for a destination inside Indiana. The Appellant contended that the contractual arrangement was legitimate; that the law does not require that the parties specifically contemplate every detail of a transaction at the moment of execution of a contract; that if the instructions, when given, identified a point inside of Indiana as the destination, those gross receipts would be clearly taxable and that it was equally clear the gross receipts were not taxable if the instruction identified a destination outside the State of Indiana. The Trial Court ruled for appellant on this point (Appendix "B", p. xxi).

Each of the foregoing points, that is, the point concerning "inspection and acceptance"; the point concerning "partial payments" and the point concerning the fixing of an out-of-state destination subsequent to contract execution, constituted a partial defense which the State raised and urged both in the Trial Court and in the Supreme Court. They are preserved in this appeal as the constituent parts of Question 2 of the "Questions Presented".

Question 3 is intended to preserve one additional partial defense relied upon by the State in relation to the meaning of the "acceptance" provisions of the sub-contracts involved in this case. The argument here is very similar to that under "inspection and acceptance" point with respect to the prime contracts. The Trial Court ruled for appellant on this point (Appendix "B", p. xxiii).

The Supreme Court of Indiana adverts in its opinion to two of the four partial defenses. In neither instance does it appear with clarity whether the Court actually relies, even in a small way, upon these two matters in reaching

its decision. These references are to the question of "inspection and acceptance" under the prime contracts and the question of "partial payments" under the same contracts, but limited, of course, to those as to which partial payments were actually made. The discussion concerning these two points appears in the opinion of the Supreme Court of Indiana (Appendix "A", pp. ix, x, xi).

While there is this doubt concerning the place in the opinion of the Supreme Court of Indiana of these two partial defenses, there is no doubt concerning the principal defense of the State which extends to all of the transactions. The Court ruled that the delivery free on board the equipment of a common carrier in Indiana of goods accompanied by shipping papers showing an out-of-state destination were "transactions completely performed in Indiana," (Appendix "A", p. xvii) if the shipping papers were Government bill-of-lading and if there was no "obligation to make deliveries, or put the buyer in possession at a point outside of the State of Indiana" (Appendix "A", p. xiv).

The Court decided that the Commerce Clause was not a bar to the application of the Indiana Gross Income Tax Act to the gross receipts arising from the transactions described, reversed the Trial Court and directed the entry of judgment for the State.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

The same order will be observed in this section as was used under the heading 'Questions Presented".

Question 1.

The Supreme Court of Indiana has held that the imposition of the gross receipts tax upon the gross receipts arising from the transactions earlier described is not barred by the Commerce Clause, because delivery was made f. o. b.

common carrier in Indiana and shipment to the out-of-state destination was made on Government bills-of-lading. In abbreviated form the reasoning and conclusion of the Indiana Supreme Court may be expressed thusly:

> By the law of sales, title passed to the United States when the manufactured items were delivered on board the common carrier; by the law of contract or agency, the common carrier became the agent of the United States under the Government bills-of-lading. Hence, "the Government had control and possession and could have re-routed or stopped the transportation at any point thereafter" (Appendix "A", p. xiii), and since the common carrier was the agent of the United States, "it is the same as if the purchaser in person had taken the articles at the plant" (Appendix "A", p. xv). Therefore, the rule applied to Class D sales in *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340; 64 S. Ct. 1019; 322 U. S. 349; 64 S. Ct. 1030, governs.

No such restrictive definition of interstate commerce under the Commerce Clause has been promulgated or approved and no such enlargement of the power of a State to impose taxes free of the effect of the Commerce Clause has been authorized by decision of this Court. There are no direct rulings by this Court, but there are cases pointing clearly in the opposite direction.

One cannot deny the fundamental principles of the law of sales, of the law of contracts, or of the law of agency. It must be remembered, however, that they are legal principles and not facts. A legal principle, valid in the area of its competence, is a useless and possibly harmful device if inappropriately employed. This Court has not approved any method by which the difficult art of constitutional interpretation may be reduced to a simple mechanical function. Constitutional significance is not determined by adding up the "fictions" of various unrelated fields of law; nor by applying principles of subsidiary areas of the law

as though such principles achieve the status of controlling fact. This method has not been followed in practice and cannot be considered justifiable in theory.

The first test of the Indiana Gross Income Tax Act in this Court resulted in a decision basic to applications by the State of that law. *J. D. Adams* v. *Storen*, 304 U. S. 307; 58 S. Ct. 913. Later cases testing the application of the same law to various fact situations have resulted in the recognition of certain distinctions by this Court. The rule of *Adams* v. *Storen* has not been revoked by this Court. To the extent, however, that the mechanical distinctions made by the Supreme Court of Indiana between kinds of shipments and kinds of bills-of-lading prevail, to that extent the *Adams* case is overruled.

The transactions in this case were such that Bendix was under contract to fulfill an entire group of responsibilities before it became entitled to payment, *i.e.*, before it earned the gross receipts. Failure by Bendix to fulfill any one of its contractual promises would have cut off the right to any gross receipts. Among the things it promised to do and for which it received gross receipts from the United States was the delivery of the items it manufactured by its own personnel, using its own equipment, and entirely at its own expense, on board a common carrier accompanied by shipping papers showing an out of state destination. *Adams* v. *Storen* contains the following language:

> "It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities, that it must fail in its entirety so far as applied to receipts from sales interstate."

So far as we are aware this Court has not passed upon the question as to whether the Commerce Clause prevents or permits the collection of a state gross receipts tax when

shipment of the goods involved in the transaction producing the gross receipts is by Government bill of lading. This Court has not decided, although there are cases that deal with the question, whether delivery f.o.b. a point in the State of origin results in a "local transaction" or a transaction in the category of interstate commerce. Only one case directly faces the problem of the effect of the Commerce Clause on a State tax law when delivery is made f.o.b. common carrier, and that case is *Gross Income Tax Division* v. *Conkey,* 228 Ind. 352; 90 N. E. (2d) 805; cert. den. 340 U. S. 941; 71 S. Ct. 504. In that case the Supreme Court of Indiana made the same point with respect to f.o.b. delivery as this Appellant makes and reached the same conclusion this Appellant reached. In the instant case the opinion of the Indiana Supreme Court attempts to throw doubt upon the decision and the supporting language in the *Conkey* case, by arguing that "the printer or the seller assumed the obligation to make deliveries, or put the buyer in possession at a point outside the State of Indiana" (Appendix "A", p. xiv). No such factual or legal question appears or is answered in the *Conkey* case. In the *Conkey* case, the Indiana Supreme Court referred to certain decisions of this Court concerning the nature of delivery f.o.b. This new interpretation given to the *Conkey* case and the effort to make the delivery free on board a common carrier match the principles of the law of sales seems at variance both with the *Conkey* case and with certain decisions of this Court to which reference will now be made. Two cases state the principle of the stream of commerce as a decisive concept:

Pa. R. R. Co. v. *Clark Brother Coal Mining Co.,* 238 U. S. 456; 35 S. Ct. 896, and

Pa. R. R. Co. v. *Sonman Shaft Coal Company,* 242 U. S. 120; 37 S. Ct. 46.

These cases required interpretation of the Commerce Clause, but did not raise questions involving a State Tax Law. In expressing the power of Congress under the Commerce Clause, however, the language in these cases seems almost to anticipate the erosive effect of a decision such as the one from which this appeal is taken. Delivery was made f.o.b. the mines and the Court said:

> "The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce. A very large part of what in fact is the interstate commerce of the country is conducted upon this basis, and the arrangements which are made between seller and purchaser with respect to the place of taking title to the commodity or as to the payment of freight, where actual movement is interstate does not effect either the power of Congress or the jurisdiction of the commission * * *"

This language militates against the validity of applying a rule of the law of sales as though it were the ruling tenet in the search for the meaning of the Commerce Clause.

This Court has said that a Federal Tax Law is invalid under the Import-Export Clause of the Constitution, Article I, Section 10, Clause 2, even though by the terms of the sale it was a fact, or assumed to be a fact, that title passed at the moment when the goods were delivered into the carrier's hands. *A. G. Spaulding & Bros.* v. *Edwards,* 262 U. S. 66; 43 S. Ct. 485. The language there used was as follows:

> "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular

steps to the contemplated result. Getting the bill-of-lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and might retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia. and for their account and risk. Theoretical possibilities may be left out of account."

Reference is made to *Joseph* v. *Carter and Weeks Stevedoring Company*, 330 U. S. 422; 67 S. Ct. 815, and to *Hughes Bros. Timber Co.* v. *State of Minnesota*, 272 U. S. 469; 47 S. Ct. 170. The *Joseph* case indicates that work done to place goods on board a common carrier is interstate in character. The *Hughes* case indicates that delivery into the stream of commerce is not dependent on "title" questions.

The foregoing cases have a direct bearing on the decision appealed from in another way as well. The position which the Indiana Supreme Court takes with respect to the Government bill of lading is such that it is fair to equate "delivery f.o.b. common carrier" and "Government bill of lading" in their effect with respect to title. A Government bill of lading is limited in use to the carriage of goods which belongs to the Government so that the delivery of goods to a carrier for shipment on a Government bill of lading accomplishes in this respect the same result as the law of sales accomplishes when delivery is made f.o.b. a common carrier at the point of origin. It is in this way that the cases cited above have their direct bearing on this phase of the decision appealed from. The Supreme Court of Indiana relies on the use of Government bills of lading in another manner as well.

The Supreme Court of Indiana cites *Illinois Central R. R. Co.* v. *U. S.*, 265 U. S. 209; 44 S. Ct. 485, an appeal from the Court of Claims by a carrier seeking to collect

regular transportation rates rather than lower land grant rates. In that case goods were purchased by the United States Government and shipment was made on Government bills-of-lading. The Court said,

> "* * * The title passed to the United States by delivery at the initial point of shipment to the carrier as agent. Land-grant rates were applicable."

There are other cases in which the Supreme Court of the United States has characterized the carrier as "agent" in legal conflicts between the carriers and the Government. The Supreme Court of Indiana takes language which denominates the carrier as "agent" and then builds upon a perfectly respectable principle by stating that since the carrier was the agent of the Government, and since it took delivery of the manufactured articles as such agent, "it is the same as if the purchaser in person had taken the articles at the plant" (Appendix "A", p. xv).

By this process of reasoning the rule of *International Harvester Co.* v. *Department of Treasury*; 322 U. S. 340; 64 S. Ct. 1019; 322 U. S. 349; 64 S. Ct. 1030 is broadened to include not only the actual presence of the purchaser in the State of origin and the transfer there to such purchaser of title, possession, and complete dominion but also the fictional presence of the purchaser through a common carrier as "agent."

This reasoning uses the concept "agent," a helpful device of language in expressing the result in cases between the carrier and the United States Government, as a "fact" in the interpretation of the Commerce Clause. This is semantically a sin and does violence to the concepts that have been used in the interpretation of the Commerce Clause.

The Supreme Court of Indiana has reasoned itself into "a most ingenious paradox." Its search for the meaning of the Commerce Clause has led it to discover the static,

tranquil "local transaction" on the very back of the interstate carrier. At the very core and heart of the interstate commerce with which our country seethes, it has located and found a "local incident." It has confused "passage of title," which concerns only a particular buyer and a particular seller at any one time, with passage of goods which concerns all of the citizens in all of the States all the time.

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. * * * All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local', and thus achieve its desired result."
>
> *Nippert* v. *City of Richmond*, 327 U. S. 416, 423; 66 S. Ct. 586, 589.

The foregoing language is as apt and appropriate to the instant case as to the case in which it was used. See also the further substantiation of the principle expressed above:

> *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, et al.*, and *Panhandle Eastern Pipe Line Co.* v. *Calvert et al.* (two cases), 347 U. S. 157; 74 S. Ct. 396.

We submit that the Supreme Court of Indiana erred in its decision. On the one hand, the substantial character of the federal questions is virtually self evident. The view

of the Indiana Supreme Court of a delivery f.o.b. common carrier in the State of origin greatly impairs, if indeed, it does not totally destroy, the presently accepted constitutional concept of a stream of commerce. Further, the view of the Indiana Supreme Court of the Government bill of lading charges in its entirety the concept of the relationship of seller, buyer and common carrier in the field of interstate commerce. These two examples are substantial in terms of the constitutional questions themselves. The effect upon economic activity far outruns the interests of the parties to this action. The decision affects the largest single buyer of goods in the United States, the United States Government itself. The effects are not limited to the United States as buyer, but extend to all buyers. Nor are the effects limited to this Appellant as seller, but extend to all sellers. Nor are the effects limited to Indiana, but extend to all States.

There are substantial federal questions which are not as obvious as the foregoing. Other areas of constitutional interpretation and of our economic life will be severely changed and modified if the rule pronounced by the Indiana Supreme Court is accepted as the rule of this Court. A Government bill of lading is not different in any significant legal way related to commerce from an ordinary customer's commercial bill of lading. The potential explosive results of this aspect of the constitutional question may be felt in other areas both constitutional and economic.

We have not here presented, but if this Court shall find that the appeal is to be permitted, we will later point out the possibility that the application of the Indiana tax to these gross receipts is constitutionally questionable not alone under the earlier majority view, but under the dissent as expressed by Mr. Justice Black in *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307; 58 S. Ct. 913, on the grounds that the tax, applied to one part of interstate commerce and

not to the rentainder is discriminatory. The other minority view as expressed in the case of *J. D. Adams Mfg. Co.* v. *Storen,* and in later cases arising in Indiana and elsewhere, may well be reconsidered in terms of the constitutional meaning of "burden" in cases under the Commerce Clause involving state and local taxes, since there is no possibility of a tax in the State of destination when the United States of America is the buyer. These, too, are substantial federal questions touching important aspects of our legal and economic activities.

We submit that this Question 1 as decided by the Supreme Court of Indiana so far changes constitutional concepts and so markedly impairs the meaning and effect of earlier decisions of this Court that it should be considered and determined by this Court rather than by a State Court, after full opportunity for the submission of briefs and for oral argument.

Questions 2 and 3.

The partial defenses present federal questions more restricted in scope than that stated in Question 1, but each is nevertheless formidable and substantial.

The meaning and effect of "inspection and acceptance" provisions of the Government contracts alone raises a question economically substantial but it also raises a question important to federal law, since it involves an opportunity to explore further the meaning of the rule of *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62; 61 S. Ct. 885, in more normal and common economic circumstances than were presented in the *Wood Preserving* case itself.

The second partial defense raises a substantial question as to what shall be considered the content of an interstate transaction. Is a writing subsequent to the execution of an instrument and substantially before delivery an appropriate

means for parties to use or, as argued by the State of Indiana, is the nature of the transaction frozen at the moment the contract is entered into? Is a transaction doubtful as to its character as intra-state or interstate at its beginning to be considered intra-state regardless of further acts of the parties? We are not aware of any decision of this Court which answers these questions.

The third partial defense relating to "partial payments" also presents a substantial question concerning the meaning and interpretation of transactions and under what circumstances they are, in the constitutional sense, to be denominated interstate or local and, thus, to be given or denied the protection of the Commerce Clause.

Question 3 presents a partial defense similar in many respects to the first partial defense discussed above under Question 2 and therefore opens a federal question of similar substantiality.

All of the facts in this case were presented by stipulation and there is no dispute concerning them. The dispute is limited exclusively to the legal effect of these facts, and their bearing upon the constitutional question of whether or not the Commerce Clause is a bar to the imposition of the tax. Each of the questions raised by each of the groupings of fact as partial defenses by the State presents a substantial federal question, which we submit, in the state of the record of this case, this Court is empowered both to consider and decide.

It would appear that the Trial Court felt that consideration and decision of these partial defenses was necessary and did therefore pass upon each of them. In candor, it would appear that the Supreme Court of Indiana, while making reference to two of these partial defenses has not in a full sense considered and decided with respect to any one of them. Nevertheless, all that remains to be done is

the application to stipulated facts of a proper constitutional rule and this lies within the power of this Court. (28 U. S. C. § 2104, § 2106).

CONCLUSION.

The principal question as expressed in Question No. 1 and traced under Statement of the Case and discussed as a substantial federal matter under the appropriate heading, constitutes, as decided by the Indiana Supreme Court, a very broad and very damaging attack upon the Commerce Clause, the generally accepted concepts of interstate commerce as they have evolved in the opinions of this Court over the years, and upon normal and accepted economic activity of widest range. Each of the questions raised in the partial defenses, though more restricted in scope, is nevertheless substantial in both the constitutional and economic sense.

We respectfully suggest that this Court may find this case an appropriate one for plenary consideration with briefs and oral argument an aid in the proper resolution of the questions it presents.

Respectfully submitted,

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APPENDIX "A."

The State of Indiana.

IN THE SUPREME COURT.

On the 5th day of June, 1957, being the 9th Judicial day of said May Term, 1957.

No. 29458.

Hon. Norman F. Arterburn, *Chief Justice.*
Hon. James A. Emmert,
Hon. Arch N. Bobbitt,
Hon. Frederick Landis,
Hon. Harold E. Achor,
Associate Judges.

In the Case of Indiana Department of State Revenue, Indiana Revenue Board, Indiana Gross Income Tax Division, *Appellant,* *vs.* Bendix Aviation Corporation, *Appellee.*	Appealed from the St. Joseph Superior Court, No. 1. 95883.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

ARTERBURN, *C. J.*
ACHOR, BOBBITT AND LANDIS, *JJ.*, concur.
EMMERT, *J.* not participating.

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IN THE SUPREME COURT OF INDIANA.

Indiana Department of State Revenue, Indiana Revenue Board, Indiana Gross Income Tax Division,
Appellant,
vs.
Bendix Aviation Corporation,
Appellee.
No. 29,458.

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT, No. 1,

HON. E. SPENCER WALTON, JUDGE.

ARTERBURN, *Chief Justice.*

This action was commenced by appellee, Bendix Aviation Corporation, pursuant to the provisions of Acts 1947, ch. 370, § 3, p. 1471, being § 64-2614, Burns' 1953 Replacement, for the purpose of obtaining a refund of gross income and bonus taxes, paid under protest, for the taxable years 1951 through September, 1953, (on fiscal year basis). The trial court entered judgment for appellee in the sum of $546,734.64 as taxes, and interest of $55,587.57 thereon, making a total judgment of $602,322.21.

The case was tried upon a stipulation of facts. Alleged error is presented by the Indiana Department of State Revenue, appellant, by way of a motion for a new trial, alleging that the decision of the trial court was not sustained by sufficient evidence, and was contrary to law.

The appellee is a Delaware corporation qualified and admitted to do business in the State of Indiana. It maintains offices and two manufacturing plants in St. Joseph County, in the State of Indiana. The appellee, during the period in question, received gross income from the United States Government and from its prime contractors on certain

government contracts. These contracts provided for the manufacture by the appellee of certain articles needed for the Armed Forces. It is appellee's contention that the receipts from all of these contracts are not subject to the gross income and bonus taxes of the State of Indiana for the reason that the State is prohibited from taxing such transactions under the Commerce Clause, (Art. 1, § 8, Cl. 3), of the United States Constitution.[1]

The Gross Income Tax Law of the State of Indiana insofar as applicable here, provides in Section 2 thereof, as follows:

> "There is hereby imposed a tax upon the receipt of gross income, measured by the number or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, * * *."
>
> Acts of 1937, ch. 117, § 2, p. 604, being § 64-2602 Burns' 1953 Replacement.

It also provides as follows:

> "There shall be excepted from the gross income taxable under this act [§§ 64-2601—64-2631]:
>
> "(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between

1. The appellant makes no contention that an exemption from the tax exists merely because the government is a party to the contract. No law is suggested which gives a contractor with either the state or federal government an exemption from payment of an income tax levied on proceeds from such contracts by the other government. *State of Alabama* v. *King & Boozer* (1941), 314 U. S. 1, 86 L. Ed. 3, 62 S. Ct. 45, 140 A. L. R. 615.

this state and foreign countries, but only to the extent to which the state of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America. * * *."

Acts 1945, ch. 143, § 2, p. 311, being § 64-2606 Burns' 1953 Replacement.

The tenor of appellee's argument seems to be founded upon the premise that if the tax is applicable to any phase of interstate commerce it is *per se* invalid. We are not prepared to accept this proposition *in toto*. We find no such inflexible rule has been laid down.

Before the adoption of the Federal Constitution the States possessed the power to tax without restraint or interference. The several States still retain and reserve this very necessary power except insofar as it is limited or restricted by the United States Constitution. We are concerned here with only one of those provisions in that Constitution, namely, the power granted to Congress "to regulate commerce with foreign nations, and among the several States * * *." Art. 1, § 8, Cl. 3, United States Constitution. This provision, it should be noted, does not *in terms prohibit* the States in the full exercise of their taxing, police, or other reserved powers; however, although these words are permissive in character to Congress as distinguished from prohibitive to the States, the interpretive language of the Supreme Court of the United States has given them a meaning which limits the several States in their taxing power in some instances. The delineation of this field within which the States may not encroach, and on the other hand, beyond which Congress may not wander, is not as distinct nor as clear as one might desire.

Freeman v. *Hewit* (1946), 329 U. S. 249, 91 L. ed. 265, 67 S. Ct. 274.

Yet, under this rather simply worded grant of power to Congress, the States cannot be deprived of their inherent and reserved taxing power, and on the other hand, they cannot by the exercise of the taxing power interfere with the congressional regulatory power over commerce among the several states.[2]

The only basis for limiting a sovereign State's taxing power under the issues raised here, is that it would interfere with the regulatory powers of Congress over commerce among the States. If there is no interference, and commerce is unimpeded, there is no warrant or authority for holding that the Commerce Clause in the Constitution of the United States makes a State's taxing laws invalid. To hold otherwise, is to create a fictitious assumption, rather than accept the realities and practicalities of the situation.

In the case of *International H. Co.* v. *Dept. of Treasury* (1944), 322 U. S. 340, 88 L. ed. 1313, 1316, 1317, 64 S. Ct.

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2. The United States Supreme Court has not offered a very dependable guide in this area. In a 5-4 decision (*Freeman* v. *Hewit* (1946), *supra*, 329 U. S. 249, 91 L. ed. 265, 67 S. Ct. 274, a majority of the court held the Indiana tax on a sale of intangibles by a broker across the State line to be invalid because it was a "direct" tax; that it was irrelevant whether or not the tax was in reality any "burden" on interstate commerce.

The dissenting opinions of the other four justices held in substance such a tax did not impede or interfere with constitutional regulatory power of Congress, and that all commerce was treated alike.

Of the original membership of the court participating in the decision there remains on the present court two members on each side of this issue. The *then* majority of the court apparently abandoned any attempt at being consistent with the past or offering any guidepost for the future when it said, (Frankfurter, J.) on page 252 of 329 U. S., 271 of 91 L. ed.:

> "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

The four dissenting justices seemed not to have such uncertainty about the necessity of settled legal principles.

1019, 64 S. Ct. 1030, the Supreme Court said in this connection:

> "But as we held in the *Wood Preserving Corp.* case, neither the Commerce Clause nor the Fourteenth Amendment prevent the imposition of the tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes.
>
> • • • • •
>
> "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson* v. *Sears, R. & Co.*, 312 U. S. 359, 363, 85 L. ed. 888, 891, 61 S. Ct. 586, 132 A. L. R. 475), we must ackowledge that the sales tax sustained in the *Berwind-White* case 'was, in form, *imposed upon the gross receipts from an interstate sale.*' Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harvard L. Rev. 40, 87. But that case did no more than to hold that those in interstate trade could not complain if interstate commerce carried its share of the burdens of local government which helped sustain it. And there was no showing that more than that was being exacted." (Our italics.)

In another case, the United States Supreme Court had this to say:

> "Nor is taxation of a local business or occupation which is separate and distinct from the transportation of intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business."
>
> *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 253, 82 L. ed. 823, 58 S. Ct. 546, 115 A. L. R. 944.

The same court said previously:

> "The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of national policy."
>
> *Federal Compress & W. Co.* v. *McLean* (1934), 291 U. S. 17, 23, 78 L. ed. 622, 627, 54 S. Ct. 267.

Of course, a state may not, under the guise of a tax, place a real burden upon commerce among the several states.

> *New York, L. E. & W. R. Co.* v. *Pennsylvania* (1895), 158 U. S. 431, 39 L. ed. 1043, 15 S. Ct. 896;
>
> 15 C. J. S., Commerce, § 5, p. 259;
>
> 51 Am. Jur., Taxation, § 203, p. 262.

At the same time it is not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of the state tax burden.[3]

> *Western Live Stock* v. *Bureau of Revenue* (1938), *supra*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546, 115 A. L. R. 944.

It follows that the exemption of those engaged in interstate commerce from taxation borne by others should not be extended beyond the necessity of keeping the movement of such commerce free from interference or a "burden" as is sometimes said. To rule otherwise, expands the Commerce Clause by implied and fictitious assumptions to a point where it conflicts with another constitutional provision,

3. States may levy taxes on motor vehicles engaged in interstate commerce for the use of public highways where the privileged tax is no greater than that imposed upon other vehicles not engaged in interstate commerce. *Clark* v. *Poor* (1927), 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702; *Interstate Transit* v. *Lindsey* (1931), 283 U. S. 183, 75 L. ed. 953, 51 S. Ct. 380; See also Court, Commerce and Trade Payers (1940), 16 Ind. L. J. 144.

and unnecessarily invades the state's sovereign and reserved powers.

The tax here involved is valid unless it is shown to interfere with congressional regulation of commerce among the states. That is ultimately the test, since fundamentally that is all the constitution takes from the State's sovereign powers and grants to the Congress of a Federal government, intended originally to be a government of *limited* powers.

Coverdale v. *Arkansas-Louisiana P. L. Co.* (1938), 303 U. S. 604, 82 L. ed. 1043, 58 S. Ct. 736;
McGoldrick v. *Berwind-White Coal Min. Co.* (1940), 309 U. S. 33, 84 L. ed. 565, 60 S. Ct. 388, 128 A. L. R. 876;
J. D. Adams Mfg. Co. v. *Storen* (1938), 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913;
Swift & Co. v. *United States* (1905), 196 U. S. 375, 49 L. ed. 518, 25 S. Ct. 276.

The stipulation of the parties goes into considerable detail in outlining the transactions which result in the receipts which are claimed to be taxable. A description of each step of the performance and its sequence is set forth. Both parties charge the other with over-emphasizing certain details and minimizing others. To us, there appears nothing particularly unusual in these details or the sequence. The transactions must be looked upon as a whole. The details should not be permitted to obscure a perspective of the larger picture.

The transactions involved in this case relate exclusively to those articles ultimately to be moved out of the State after their manufacture at the two plants of the appellee at South Bend, Indiana. The performance on the part of Bendix was essentially that of manufacturing. During this process and at its termination, the Government and

the prime contractors, as the case may be, made their inspections. Then came a time when "acceptance" of the manufactured article was made by the Government and the prime contractors. Without going into detail as to the provisions of the various contracts of the Army, Navy and Air Force, we quote from Section XIV of the Armed Services Procurement Regulation entitled "Inspection and Acceptance" which is applicable to the contracts involved:

> "14-200. General.—Acceptance is the act of an authorized agent of the Government by which the Government acknowledges and agrees that the supplies or services are in conformance with the contract requirements, including those of equality and quantity. Passage of title does not necessarily occur at the time of acceptance. Depending upon the provisions of the contract, acceptance may be effected prior to delivery, at the time of delivery, or after delivery. Generally, however, contracts shall provide that acceptance shall be accomplished as promptly as practicable after delivery. Except as may otherwise be provided in the contract, acceptance shall be conclusive except as regards to latent defects, fraud or such gross mistakes as amount to fraud. Except as otherwise provided in this section, supplies and services shall not be accepted prior to inspection. Inspection where made prior to acceptance, shall be merely for the convenience of the Government and without binding effect as to acceptance."

The above provisions seem to us to cover the situation adequately so far as we are here concerned.

Insofar as the matter of the passage of title of the manufactured articles affects the question here involved, it is agreed by the parties that in those cases where the Government made partial payments under a contract, title vested in the Government at that time, and all things connected with the specific contract, from the raw material through partially processed and completely processed and manu-

factured items. It was further stipulated in that connection that:

> "* * * it is agreed that Defendant [Indiana Department of State Revenue] may contend that the Plaintiff was furnishing special services rather than making a sale of goods."
> Stipulation A-1.

With reference to the remaining manufactured articles for which no partial payment was made, the contract of the parties provided for the delivery as follows:

> "A-8. Delivery and Shipment. All of the items sold under the contracts involved in this action were shipped to the Government by common carrier, some being shipped by rail, some by truck, and all shipments being made f.o.b. carrier's equipment at the South Bend, St. Joseph County, Indiana, Plant of Plaintiff. All of the items sold by Plaintiff were placed on board the carrier's equipment by Plaintiff in accordance with the contract requirement. All shipments were made f.o.b. upon Government bills-of-lading. Each contract required delivery by Plaintiff on certain dates or within certain periods."

Those articles manufactured by appellee under sub-contracts for prime contractors of the Government were to be delivered in the same manner, namely, to the Government's carrier at the appellee's plants in South Bend. The shipping destinations on the bills-of-lading in all instances were outside the geographical limits of the State of Indiana. This was true for all manufactured articles under contracts in which the Bendix was a prime contractor, as well as those in which it was the sub-contractor. The Government designated the destination, arranged for and provided the carrier. In all shipments the Government's bills-of-lading were used wherein the property shipped was identified as the property of the United States Government. The distinction to be pointed out between the commercial bill-of-

lading and the Government bill-of-lading is that the former is a contract between the shipper or consignor and the carrier, while the latter, by its language, is a contract between the Government and the carrier. The form of this instrument was prepared by the Government and one of the reasons therefor, was for the purpose of securing the advantages of certain rates for shipments over land-grant railroads. The contracts in this case provided for preferences to such railroads in the shipment of goods here involved. In considering the legal effect of a Government bill-of-lading, the United States Supreme Court has said:

> "* * * the title passed to the United States by delivery at the initial point of shipment to the carrier as agent. Land-grant rates were applicable."
>
> *Illinois Central R. Co.* v. *United States* (1924), 265 U. S. 209, 68 L. ed. 983, 44 S. Ct. 485.

The parties seem to be in substantial agreement that at the time the manufactured articles were loaded on the carriers at the Bendix plants in Indiana, title and possession passed from appellee to the Government, and all control over its movement passed from Bendix.

> Uniform Sales Act, Acts 1929, ch. 192, § 19, p. 628, being § 58-203, Burns' 1951 Replacement.

Bendix contends that in accordance with the terms of the contract, it manufactured, packaged, and placed the goods on a common carrier "in the stream of commerce" bound for out-of-state destination, and that such commerce is exempt from state taxation. The appellant, on the other hand, says that the tax here is laid upon an entirely local Indiana activity consisting mainly of the manufacture of the articles for which the receipts involved here were obtained, and that although Bendix had the obligation to make delivery at the factory on a carrier, its title, possession, and control over the articles ended at that point in appel-

e's plant in Indiana. Before a tax is invalid appellant ays "there must be some activity of the seller which xtends beyond the borders of the state of Indiana." The ppellee had no duty to make delivery at any point outside ie state of Indiana—in fact, outside its plant.

There is no question about the government bill-of-lading xing the title in the Government. When the articles manfactured were placed f.o.b. carrier at the plant the Governent had control and possession, and could have rerouted r stopped the transportation at any point thereafter.

The authorities cited by the parties center mainly about ie interpretation to be given the cases of *Gross Income ax Div.* v. *Conkey Co.* (1950), 228 Ind. 352, 90 N. E. 2d 05, Cert. Denied (1951), 340 U. S. 941, 95 L. ed. 679, 71 . Ct. 502 and *Treasury of Indiana* v. *Wood Preserving orp.* (1941), 313 U. S. 62, 85 L. ed. 1188, 61 S. Ct. 885.

In the *Conkey* case a printer and manufacturer of books nder contract with the publisher, sent the books after anufacture across state lines to purchasers as directed y the publisher, who was selling the books to his customers. he court said in the *Conkey* case, *supra*, at page 357, ith reference to the Indiana tax applicable to the receipts erefrom by the printer:

> "It would seem to us that as to the printing and binding of books, as here, the appellee was rendering a local service and the gross receipts therefrom are not from interstate commerce. What appellee was being paid for was the service rendered and its materials used in an activity purely local in nature. *Dept. of Treasury of Indiana* v. *Ingram-Richardson Mfg. Co.* (1941), 313 U. S. 252, 85 L. ed. 1313, 61 S. Ct. 866; *Western Live Stock* v. *Bureau* (1938), 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546.
>
> . . . . .
>
> "The delivery of the books by appellee to the carrier in the manner as above pointed out was but an

incident to and in aid to its local printing and binding business as was the case in *Dept. of Treasury* v. *Ingram-Richardson, supra.*"

In addition, the manufacturer in the above case also bought bookcases to be used with the set of books printed, and resold the cases with the books and shipped the cases across state lines to customers as directed by the purchaser. The court in that case held those transactions were not entirely local, but were in interstate commerce. No manufacturing was involved in the latter transaction, and it seems the printer or seller assumed the obligation to make deliveries, or put the buyer in possession at a point outside the State of Indiana.

Gross Income Tax Division v. *L. S. Ayres & Co.* (1954), 233 Ind. 194, 118 N. E. 2d 480.

In the *Wood Preserving* case, *supra*, the company sold ties to a railroad. The railroad ties were inspected by an agent of the railroad as they were brought to its siding in Indiana from points in Indiana, and those accepted were immediately placed on cars belonging to the railroad. A bill-of-lading was then executed by the Wood Preserving Corporation designating itself as consignor. An agent of the railroad at Finney, Ohio, was named consignee. The purchasing railroad was designated as the carrier. The United States Supreme Court held that the receipts from the sale of the ties were properly taxable by the State of Indiana.

The appellee, Bendix, in its brief, makes the following comment on this case:

"The plaintiff in the instant case and the Defendant here are not in dispute over transactions of the kind which occurred in the *Wood Preserving* case. If, for example, items are manufactured and sold to the United States Government to be transported to a point outside the State by the Government's own conveyances

and the Government then sends its own transportation equipment to South Bend to pick up the items, as for example, by military plane at our County airport, everyone would admit that the State of Indiana is entitled to collect gross income tax on the gross receipts from such sale. The example corresponds to the facts of the *Wood Preserving* case."

The line which appellee draws between taxable and non-taxable receipts appears to us to be unjustified. There is no difference in the effect on interstate commerce whether the purchaser in such a case carries the article away and across the state line *in his own vehicle*, or *has an agent* on hand at the time of delivery to take possession and carry it across the state line for him. In either instance, the result is the same. In the case before us, the carriers who came to the plant of the Bendix Corporation in Indiana and took delivery of the manufactured articles were agents of the purchasers, and to all practical effects, it is the same as if the purchaser in person had taken the articles at the plant.

We believe many of the points of dispute in this case are answered by the case of *International H. Co.* v. *Dept. of Treasury*, *supra*, (1944), 322 U. S. 340, 88 L. ed. 1313, 64 S. Ct. 1019, 64 S. Ct. 1030; *Dept. of Treasury* v. *International Harvester Co.* (1943), 221 Ind. 416, 47 N. E. 2d 150.

This is particularly true in connection with appellee's reliance upon a statement in the *Conkey* case that "the transporting of the property out of the State was not within the contemplation of or part of the local sales contract."

The Supreme Court of the United States in the *International Harvester* case, *supra*, gave consideration to various types of transactions covered by the Indiana tax, and made the following statement at page 345 of 322 U. S., p. 1317 of 88 L. ed.:

"The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to

> Indiana, takes delivery there and transports the goods to another state. The *Wood Preserving Corp.* case indicates that it is immaterial to the present issue that the goods to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana."

The *mere knowledge* on the part of the seller in Indiana of the intended out-of-state destination of goods sold and delivered in Indiana to a buyer does not convert an intrastate transaction to an interstate transaction, and thereby create a burden interfering with congressional regulation of such commerce.

Appellee, Bendix, in its brief, makes the further contention:

> "The Appellee's obligations to the United States Government are a continuing thing with delivery upon the selected carrier the constitutional equivalent of the delivery of the goods to the point of destination."

The weight of authority seems to be against the appellee on this point.

> "It is generally held that a movement merely in preparation for export—in other words, a mere transfer of the property to a depot or other place within a state from which the transportation or journey to another state is to begin at a convenient time—is not a part of that transportation, so as to exempt the property because of such transfer or movement from state taxation upon the ground of interference with or burden upon interstate commerce."
>
> 51 Am. Jur., Taxation, § 205, p. 266.

The Supreme Court of the United States has also said in the *International Harvester* case, *supra*, at page 345 of 322 U. S., p. 1317 of 88 L. ed.:

> "In *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. ed. 565, 60 S. Ct. 388, 128 A. L. R. 876, we had before us a question of the constitutionality

of a New York City sales tax as applied to purchases from out-of-state sellers. The tax was 'laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price.' *Id.* 309 U. S. p. 43, 84 L. ed. 568, 60 S. Ct. 388, 128 A. L. R. 876. And it was 'conditioned upon events occurring' within New York, *i.e.*, the 'transfer of title or possession of the purchased property.' *Id.* pp. 43, 44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce. In neither does the tax aim at or discriminate against interstate commerce. The operation of the tax and its effect on interstate commerce seem no more severe in the one case than in the other.''

Looking at these facts as a whole before us, the receipts resulted from transactions completely performed in Indiana. The performance was essentially local in character. The tax does not discriminate against interstate commerce nor does it interfere with the grant of power to Congress to regulate commerce among the several states.

Indiana Farmers Guide Pub. Co. v. *Dept. of Treas.* (1940), 217 Ind. 627, 29 N. E. 2d 781;
11 Am. Jur., Commerce, § 34, p. 34.

Since the facts herein have been stipulated a new trial will serve no purpose. The judgment is reversed with direction to enter judgment for the appellant.

Achor, Bobbitt and Landis, *JJ.*, concur.

Emmert, *J.*, not participating.

No. 29458 In the Supreme Court, May Term, 1957 Ind., Dep't of State Revenue, Gross Income Tax Div'n vs. Bendix Aviation Corp. Certified Copy of Opinion. Mabel E. Lyons, *Clerk Supreme Court.*

APPENDIX "B"

STATE OF INDIANA
ST. JOSEPH COUNTY } ss:

IN THE ST. JOSEPH SUPERIOR COURT NO. 1.

February Term, 1956.

Bendix Aviation Corporation,
A Corporation
Plaintiff,
vs.
Indiana Department of State Revenue, Indiana Revenue Board, Indiana Gross Income Tax Division,
Defendant.

Cause No. 95883

OPINION.

This suit was brought by the Bendix Aviation Corporation to recover taxes collected by the Indiana Department of State Revenue under the Indiana Gross Income Tax Act of 1933. The transactions taxed all involved sales as primary contractor to the United States Government or on a sub-contract to a corporation with a contract with the government.

Facts are stipulated by the parties and show six separate types of transactions in question.

The question, in each of the six types of transactions, is whether or not the transaction constituted sales in interstate commerce that would come under the provisions of

the Indiana Gross Income Tax Act which provides in its Section 64-2606 (Burns Indiana Statutes) that there shall be excepted from the gross income taxable under this act "(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the state of Indiana is prohibited from taxing such gross income tax by the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United States of America, but only to the extent that the state of Indiana is prohibited from imposing a tax upon such salaries, pensions, emoluments, interest and or earnings, by the Constitution of the United States of America."

It is conceded that the Indiana Gross Income Tax Act is a burden on interstate commerce *J. D. Adams Mfg. Co.* v. *Stores*, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429. However, it has also been held that the gross income tax may be imposed on receipts from transactions which are intrastate, "even though the total activities from which the local transaction derives may have incidental interstate attributes" *International Harvester Co.* v. *Dept. of Treasury, State of Indiana*, 322 U. S. 340.

Here the transactions involved undoubtedly have interstate attributes. All transactions involved a contract for the purchase of manufactured goods, of a type ordinarily manufactured by the plaintiff for other customers, which are then manufactured in the Indiana plants of the plaintiff and delivered by common carrier at places outside of the state of Indiana.

Plaintiff contends that the transactions are interstate in nature so that they cannot be taxed under the Indiana Gross Income Tax Act.

Defendant contends that certain practices and contractual provisions between the plaintiff and the U. S. government, or contractor of the U. S. government, make each of the transactions involved intrastate, with only interstate attributes.

Plaintiff has numerous contracts which, in all probability, are not taxable under this law because they come within the provisions of the law as stated in *J. D. Adams Mfg. Co.* v. *Stores, supra.* Typical of these transactions would be a contract with the X Company in which the X Company would contract for the purchase of certain manufactured goods with the plaintiff; plaintiff would then manufacture these goods in their Indiana plants and deliver said product f.o.b. common carrier in Indiana for shipment to X outside the state of Indiana.

In what way do the transactions here questioned differ from this typical non-taxable transaction?

First, the contractual provisions and practices involving the inspection of the goods. Here the government maintained in the plant of the plaintiff a group of inspectors who in actual practice make the final inspection for the buyer. However, on occasions, after final inspection and packaging, which had been approved, a completely manufactured article, which had been inspected and approved, was broken out of the package and plaintiff was required to perform further operations thereon, if further inspection showed it to be defective.

Second, the contractual provisions and practices involving acceptance of the goods by the government. Inspection preceded acceptance, both in practice and by the provisions of the contract. Form DD 250, which is Exhibit "F" in the stipulation, is probably the instrument of acceptance, and this was executed by the government agent at the plant of the plaintiff in Indiana sometime after the

manufactured articles were placed on board the common carrier for shipment.

Third, the contractual provisions and practices regarding the shipment of the goods. The buyer retained the right to designate the common carrier and shipment was made on Government bill-of-lading (Exhibit "D" of stipulation), which described the articles shipped as "public property" or property of the buyer. Also, in some of the contracts, the destination of the goods was not disclosed as being outside of the state of Indiana until after the contract was made.

These three factors are the most important involved, although there are two other fact patterns. In some of the transactions the question of partial payment under the government contract when, by action of the contract, title passed is a factor. Another classification involved those contracts by the plaintiff as a sub-contractor with contractors of the U. S. Government.

In *Department of Treasury* v. *Wood Preserving Co.* 313 U. S. 62; 85 L. Ed. 1188, 61 S. Ct. 885 (1941) we have several similarities with the present case. Inspection was made by the buyer in Indiana. Acceptance was made by the buyer in Indiana. The language of the court in this case is as follows: "In these transactions, respondent through its agent at once accepted from its vendors the ties which the Railroad Company found satisfactory and then and there sold and delivered these ties to the Railroad Company. These were local transactions—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana."

One difference appears in the instant case from the facts in the *Wood Preserving* case That difference is in the shipment or delivery of the goods to the buyer. In the instant case the delivery was on board a common carrier

for transportation to the buyer outside of the state of Indiana. In the *Wood Preserving* case the language of the court is "The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment." Clearly the court considered the transaction there completed even before the loading on the railroad cars, and thus a taxable transaction.

In the *Wood Preserving* case the delivery was made to the buyer under a contract whereby the buyer was to take immediate control of the purchased article at an agreed price.

True the railroad buyer under another contract agreed to then transport the ties to the plant of the seller outside the state of Indiana, but the buyer had complete control of the purchased article and conceivably could have delivered the ties any place, including a place within the state of Indiana. If the railroad did not deliver the ties to the plant of the seller in Ohio there could possibly have been an action by the seller for a breach of contract for the processing of the ties, but nothing more was to be done by the seller as far as the sale of the ties in Indiana was concerned. In the instant case the U. S. government would not take actual possession of these articles until they were delivered by the common carrier outside the state of Indiana. Neither the buyer nor the seller had control of the transportation; it was a common carrier in interstate commerce.

In my opinion, the use of the government bill-of-lading was not in itself a delivery to the government. Clearly, the parties contemplated and, in fact, did place the articles on board the common carrier and deliver the articles in interstate commerce. In *Gross Income Tax Division* v. *Conkey*, 228 Ind. 352; 90 N. E. (2d) 805 (1950) Cert. Den. 340 U. S. 941; 95 L. Ed. 679, 71 S. Ct. 504, the court says

"The Sale of these bookcases can be distinguished from the sale considered in *Dept. of Treasury* v. *Wood Corp., supra,* as there the property was actually delivered by the seller to the purchaser who accepted it in Indiana. In that case the transportation of the property out of the state was not within the contemplation of or part of the local sales contract."

Typical use of the government bill-of-lading can best be illustrated by its use in the sub-contracts of the plaintiff considered here. In my opinion, there is no question but that the articles sold by the plaintiff under sub-contracts with prime contractors of the U. S. Government, said articles to be delivered outside the state of Indiana, are clearly transactions in interstate commerce and not taxable under the Indiana Gross Income Tax law. But in these cases there is also used, in the shipment of these articles between two government contractors both of whom are private corporations, the government bill-of-lading. Therefore the use of both by the prime contractor and the sub-contractor can only be held to be incidental and not a determining factor.

We have left to consider only the matter of the passing of title upon a partial payment by the government to the contractor plaintiff. Consideration has been given to the provisions of the contract between the U. S. government and the plaintiff and also the practice under these contracts. In my opinion, it would not be consistent to hold that the passing of title in this instance would be sufficient to change the concept of the transactions so that it would become a service contract and fall within the decisions such as *Dept. of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252, 61 S. Ct. 866 (1941) and, *Gross Income Tax Division* v. *Conkey, supra,* (as to the printing and binding of books).

In the opinion of this court, all the transactions here considered are interstate in nature and cannot be construed as intrastate with only interstate attributes. These transactions directly involve the great universal stream of commerce between the several states. It must be remembered that the Indiana Gross Income has expressly been determined to be a burden on interstate commerce and that if the Indiana Legislature wishes to tax transactions such as those here involved it may at any time adopt a privilege tax and do so. It is not the duty of the court to establish the taxing policy of this state.

If the attorneys for the plaintiff will prepare the proper judgment form, judgment will be entered consistent with this opinion.

E. SPENCER WALTON, *Judge* (Signed)
St. Joseph Superior Court No. 1

Done at South Bend, Indiana, this 13th day of April, 1956.

APPENDIX "C".

Judgments Below.

The final order of the Supreme Court of Indiana was a simple reversal of the judgment of the Trial Court with directions to enter judgment for the Appellee herein. The record entry (Tr. p. 112), being formal only, is not set forth.

The judgment of the Trial Court was in words and figures as follows (Tr. pp. 30-31):

Decree.

Comes now the Plaintiff by its Attorneys, Richey W. Whitesell, and Crumpacker, May, Beamer, Levy & Searer, and having filed herein its amended complaint, which is in the following words and figures, to-wit: (Refer to pages ..... for amended complaint), and comes also the Defendant by Edwin Steers, Jr., Attorney General of the State of Indiana, and Carl Franceschini, Deputy Attorney General of the State of Indiana, and having filed herein its answer thereto, which answer is in the words and figures following, to-wit: (Refer to page ..... for answer to amended complaint), and said cause being now at issue is submitted to the Court for trial without the intervention of a jury, a jury having been expressly waived by both parties, and the parties having stipulated all of the evidence in writing, and having filed said written stipulation with the Court, and the Court having examined said stipulated evidence, the briefs of both parties, and having heard argument of counsel and being fully advised in the premises, now finds for the Plaintiff and against the Defendant; and that it is entitled to recover from the Defendant the sum of Five Hundred Forty-six Thousand Seven Hundred Thirty-four

and Sixty-four Hundredths Dollars ($546,734.64) of taxes and interest illegally collected, and interest of Fifty-five Thousand Five Hundred Eighty-seven and Fifty-seven Hundredths Dollars ($55,587.57) from the date of overpayment, and costs.

It Is, Therefore, Considered, Adjudged and Decreed by the Court that the Plaintiff recover from the Defendant the sum of Six Hundred Two Thousand, Three Hundred Twenty-two and Twenty-one Hundredths Dollars ($602,322.21), and costs.

Dated this 18 day of April, 1956.

E. Spencer Walton,
Judge of the St. Joseph Superior Court No. 1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 701

BENDIX AVIATION CORPORATION,

Appellant,

vs.

INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,

Appellee.

APPELLANT'S BRIEF IN REPLY TO APPELLEE'S MOTION TO DISMISS.

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IN THE

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BENDIX AVIATION CORPORATION,
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INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,
Appellee.

APPELLANT'S BRIEF IN REPLY TO APPELLEE'S MOTION TO DISMISS.

Pursuant to Rule 16 (3) of this Court, Appellant in the above entitled cause files this brief in opposition to Appellee's Motion to Dismiss.

We respectfully request this Court's forbearance so that we may make brief comments upon the sections of Appellee's Motion to Dismiss entitled, "Questions Presented" and "Statement", and then combine this material in a single discussion under "Argument".

QUESTIONS PRESENTED.

Question A as stated by Appellee consists of Appellant's Question 1 of the Jurisdictional Statement; to which has been added the first alternative as presented in Question

2 of Appellant's Jurisdictional Statement. Question A is faulty because Appellee fails to identify the carrier as a "common" carrier and Appellee assumes with finality that the "inspection and acceptance" provisions of the contracts between Appellant and the United States of America are legally and factually identical to the "acceptance" in *Department of Treasury* v. *Wood Preserving Corporation,* 313 U. S. 62, 61 S. Ct. 885.

Question B as presented in Appellee's motion to dismiss suffers equally from these defects.

STATEMENT.

In the first grammatical paragraph of Appellee's Statement (Appellee's Motion p. 4) appears an inadvertent error as to date. The taxes sought to be recovered were paid upon gross receipts received between January 1, 1951, and September 30, 1953.

Appellee's Statement is relatively extensive and the facts therein stated are true, but there are other facts which are also true. All of these must be considered together in order to gain a complete and accurate picture of the nature and meaning of the numerous contractual provisions relating to "inspection and acceptance." The Statement in Appellee's Motion collects and presents those facts which Appellee feels will aid in establishing an identity of "acceptance" in the instant case and the *Wood Preserving* case. The fallacy of basing the Questions Presented above and the Statement on the hope of establishing this necessary assumption will be discussed in the Argument below.

The last paragraph of the Statement by Appellee notes that "appellant has not questioned the facts as stated in the opinion of the Supreme Court of Indiana, either by its Petition for Rehearing * * * or by its Jurisdictional State-

ment. * * *" If Appellee means that the Appellant has not questioned the statement by the Supreme Court of Indiana of separate, specific, individual facts, then, the Appellee is correct. If, however, Appellee means that Appellant has not questioned the interpretation given to the facts, or the meaning in law assigned to the facts, or the significance constitutionally of the facts as stated by the Supreme Court of Indiana, then Appellee's notation is inaccurate. We respectfully point out that the meaning and applicability of cases relied on by the Supreme Court of Indiana in its opinion and its analysis of the facts and the principles of constitutional interpretation applied by it were questioned in the Petition for Rehearing filed in that Court and that the questions there raised are preserved by the Jurisdictional Statement. Of twelve points raised in the Petition for Rehearing, eight challenge the meaning of the facts as decided or apparently decided by the Supreme Court of Indiana. Of these, Point 7 of the Petition specifically raises the question differentiating the *Wood Preserving* case from the facts of this case. In the Jurisdictional Statement this problem was preserved for consideration by this Court by references to be found on Page 11, including the footnote on that page, and particularly the material at the bottom of Page 11 and the top of Page 12, referring specifically to the *Wood Preserving* case and calling the attention of this Court to the ruling of the Trial Judge on this point. The point was discussed beginning at the bottom of Page 16 by reference to *Gross Income Tax Division* v. *Conkey*, 228 Ind. 352, 90 N. E. (2d) 805; cert. den. 340 U. S. 941, 71 S. Ct. 504, and by a series of references to decisions of this Court which were submitted as indicative of the factors considered by this Court on questions of this kind although, we submit, the particular point itself remains undecided. Moreover, reliance upon *Wood Preserving* is challenged on Page 19 through the middle of Page 22, and the specific interpretation of

"inspection and acceptance", which is assumed as true by Appellee in its Argument, is specifically raised on Page 23 of the Jurisdictional Statement under the heading Questions 2 and 3. This is felt to be appropriate in view of the fact that although the point was mentioned, it did not appear to be relied upon in the decision of the Supreme Court of Indiana.

ARGUMENT.

IN REPLY TO POINTS I AND II OF APPELLEE'S ARGUMENT.

Appellee's Assumption in the Stipulation of the Parties and the Lower Courts.

Appellee's Motion to Dismiss represents Appellee's decision to rely upon a certain legal conclusion, much disputed in both lower courts, as though the facts marshalled by the Appellee necessarily lead to the conclusion. Points I and II of Appellee's Argument stem entirely from this unwarranted assumption. Without this assumption the Appellee's Motion is without merit. It is our purpose to demonstrate that the assumption itself is without merit.

The impropriety of the assumption by Appellee that the "acceptance" in this case is identical with the "acceptance" in *Wood Preserving* may be demonstrated in three ways.

1. Paragraph 3 of Sub-section A of Appellee's Motion refers to the "Material Inspection and Receiving Report", which has been informally identified in the course of this case as Form DD250, and is formally designated as Stipulation Exhibit "F" (Tr. p. 97). Appellee recites a portion of the history of the use of this Form DD250 in its Statement, but makes no mention of the fact that the copy thereof which Appellant received from the Government was not signed or distributed to Appellant until after the goods manufactured and sold by the Appellant were delivered by the Appellant to the United States Government, by loading on board a common carrier and the common carrier had taken off on its interstate journey (Tr. p. 68, l. 18 to p. 69, l. 6). This one omitted fact alone cast sub-

stantial doubt upon the validity of the assumption necessary to establish Appellee's points of Argument I and II.

2. Appellee argued strenuously and at length in the Trial Court to establish, as the legal meaning of the facts, this very assumption. The argument was rejected by the Trial Court and this result is reported in the Jurisdictional Statement beginning with the last grammatical paragraph on Page 11 and extending to Page 12 thereof. The opinion of the Trial Court on this point may be examined beginning at Page xxi of Appendix B of the Jurisdictional Statement.

3. The same argument was made by the Appellee in its Brief filed with the Supreme Court of Indiana under subheading B of point I of its Argument, and its effort to establish this point was continued vigorously in its Reply Brief to the same Court, particularly in the Conclusion in said brief beginning on Page 26 thereof. The Supreme Court of Indiana made reference to the argument and cites still another factual portion of the Stipulation omitted by Appellee, a quotation from Section XIV of the Armed Services Procurement Regulation. This provision simply indicates that "acceptance" may come before or after, or simultaneously with the passage of title and the Supreme Court of Indiana says (Page x, Appendix A of the Jurisdictional Statement), "The above provisions seemed to us to cover the situation adequately so far as we are here concerned." Thereafter the Court in its decision relies upon the *Wood Preserving* case and others, but eliminates any further consideration of the "acceptance" argument of the Appellee. Instead, the Supreme Court of Indiana urges the combined points (1) that title passed by the law of sales and (2) the common carrier was acting as an "agent" of the United States Government which, therefore, was picking up its own goods in the way the railroad picked them up in the *Wood Preserving* case and

the way the customer picked up the goods in the Class D sales in *International Harvester Company* v. *Department of Treasury*, 322 U. S. 340; 63 S. Ct. 1019; 64 S. Ct. 1030. The identity of "acceptance" in the instant case and *Wood Preserving* is not relied upon by the Supreme Court of Indiana unless the sentence from its opinion cited above shows such reliance. (Appendix A, pp. xi-xvi, Jurisdictional Statement).

Appellee's Ten Common Factors.

Appellee sets out ten factors billed as being common to this case and *Wood Preserving*. We shall follow the numbering arrangement of Appellee's Motion to Dismiss beginning at Page 11. We concede that Factors 1 and 2 are common to both cases The remaining "common" factors reveal traits of marked diversity.

Factor 3. In *Wood Preserving* the parties recognized that the purchaser would transport its goods to points outside of Indiana in the purchaser's own conveyance (purchaser was a common carrier, but took the goods as purchaser only and not as common carrier). In this case, the contracts recognized that seller would deliver the merchandise on board the conveyance of a common carrier, which would transport the purchaser's goods (title to which passed in Indiana at the moment of delivery on board the common carrier) to that destination outside of Indiana called for in the shipping papers.

Factor 4. In *Wood Preserving* the purchaser by its agent inspected the goods and accepted those which were approved in the sense that the acceptance was of quantity and quality plus the acceptance both of title and physical possession and domination over the goods. In this case the purchaser by its agent (the Government Chief Inspector) accepted the goods which were approved in the sense

that the acceptance was of quantity and quality, but the contracts provided and the actions of the parties resulted in delivery, not to the purchaser, but to a common carrier for immediate carriage and delivery to the purchaser at a destination outside of Indiana.

Factor 5. In *Wood Preserving* the sale was completed in Indiana through the acquisition by the buyer of the goods, title thereto, possession thereof, physical domination thereover, by deposit upon one of the purchaser's own conveyances. In this case the sale was completed in Indiana by virtue of the law of sales. But, by virtue of the delivery on board a common carrier for immediate shipment to a destination outside of Indiana, the sale was also completed in Indiana as a part of the stream of interstate commerce. The control over the goods which the purchaser had was different in substance from the control in *Wood Preserving* and was identical in theory to that which is discussed in *A. G. Spaulding & Bros.* v. *Edwards*, 262 U. S. 66, 43 S. Ct. 485, with quotation appearing pp. 18-19 Jurisdictional Statement.

Factor 6. In *Wood Preserving* the goods were loaded upon the carrier in Indiana, not as carrier but as conveyance of purchaser. In this case the goods were loaded not upon the conveyance of purchaser, but upon carrier as "common carrier."

Factors 7 and 8. In *Wood Preserving*, the delivery was f.o.b., not the seller's place of business, but the purchaser's place of business, and with that delivery to the purchaser in Indiana the transaction contemplated by the parties was ended. The bill of lading in the *Wood Preserving* case did not speak the truth for the goods were already both in the possession of and in the conveyance of the purchaser. In the instant case the delivery is f.o.b. the equipment of the common carrier itself and the bill of lading speaks the truth—the goods are in the stream of interstate commerce.

Factor 9. The statement as made is true but it does not specify the very substantial difference between the kind of liability that attaches when the public means of conveyance is used as opposed to that which is true when the owner himself takes over the goods.

Factor 10. This statement, too, is technically true, but it is one thing to say that the purchaser himself, with the goods in his possession, has the absolute power and right to divert, and another thing entirely to say that the purchaser has such power and right but only through directions to a common carrier. (See *A. G. Spaulding & Bros.* v. *Edwards,* 262 U. S. 66, 43 S. Ct. 485.)

Appellee's Position in Its Official Instructions and in Its Brief in Wood Preserving.

It is likely that Appellee's position as expressed in the Motion to Dismiss is more strongly stated than held. In the present Regulations of the Indiana Department of State Revenue, being *Regulations 56, Series VIII,* effective January 31, 1956, and prepared after this litigation was pending, there are two rules stated under Instruction 11-8, as follows:

> "Rule 2. Income is taxable if it is derived from a sale of goods shipped from a point in Indiana on a Government bill of lading to an out-of-state destination."
>
> "Rule 4. Income is not taxable if it is derived from sales of goods which are picked up in Indiana by a common carrier, which was ordered to do so by the out-of-state purchaser, and delivered to an out-of-state destination."

The obvious fact that a common carrier could no more be an agent under Rule 2 than under Rule 4, is a considerable argument without words.

In its Instruction 11-1 the Department specifically states

that it recognizes non-taxability as a general rule of income from sales of personal property upon receipt of a prior order and if by the terms of the sale agreement the Seller is required to and does ship from a point in Indiana to a purchaser or to a consigneee designated by the purchaser to a destination outside of Indiana, including shipments made on bills-of-lading showing Seller or customer, or third party as the shipper of record. At this point there is a parenthetical exception for cases in which inspection and acceptance is at the seller's place of business prior to shipment and when shipments are made on Government bills-of-lading. Shipments made on commercial bills-of-lading in which the customer or a third party, the customer's customer, is the shipper of record, are transactions in which delivery is made free on board the common carrier, title passing at that moment, and the shipper of record becomes the party in contract relationship with the common carrier. In terms of interstate commerce everything true about a Government bill-of-lading under these circumstances is also true of a commercial bill-of-lading, but Indiana recognizes the latter only as nontaxable.

When the State of Indiana sought certiorari in *Wood Preserving*, its brief in support of its petition specifically recognized the distinction now made by this Appellant and now denied by Indiana:

> "Goods bought in one state for transportation to another state in cases where title passes in the latter state constitutes interstate commerce in its simplest conception. Upon the same principle it is held that where there was a regular course of business contemplated by the parties which took the goods sold into another state as an essential part of the transaction, and where by mutual agreement such goods are put into the hands of a third person, a common carrier, for transportation to the latter state,—that in such case interstate commerce is involved. But,

where the buyer accepts delivery and title upon its own property in the seller's state and the subsequent transportation is made via the buyer's transportation facilities, the transaction is intrastate notwithstanding the seller may at the time have known of the course of business whereby the buyer was to make further transportation of such goods."

(Records of the Supreme Court of the United States Vol. 151, Transcripts of Records and file copies of briefs, p. 19, Cause No. 654, October Term, 1940, petition for a writ, etc., and brief in support thereof.)

We believe that the instant case and *Wood Preserving* are not comparable in any manner that would have a substantial effect upon the issue before this Court. Comparison may better be made between the instant case and *Nudelman* v. *Globe Varnish Company*, 114 Fed. (2) 916; cert. den. 312 U. S. 690, 61 S. Ct. 621.

In Reply to Point III of Appellee's Argument.

Point III of Appellee's Argument is simple and direct—this appeal should be dismissed because multiple taxation is not possible. On pages 22 and 23 of the Jurisdictional Statement Appellant referred to this question and the constitutional questions inherent in it.

"Burden" as actual or possible by way of multiple taxation, and "burden" as "one single tax-worth of direct interference with the free flow of commerce" (*Freeman* v. *Hewit*, 329 U. S. 249, 256; 67 S. Ct. 274, 279) remains a vital and undetermined question in interpretation of the Commerce Clause. Is a direct and unapportioned tax a burden? Is a transaction to be protected when the customer is an ordinary commercial firm and in danger of taxation elsewhere, and not to be protected when the customer for the same goods is the United States and, therefore, in no danger of taxation elsewhere? Is

the nature of the transaction controlling or the nature of the customer? The statement "multiple taxation is not possible" applied to the facts in this case itself raises a substantial federal question.

In Reply to Point IV of Appellee's Argument.

Point IV of Appellee's Argument is based on the identical assumption with reliance upon the identical legal reasoning as it has applied to gross receipts of Appellant arising from prime contracts, but here there is added an inference which is contrary to the specific language of the contracts, *i. e.*, since the Government was satisfied how could the prime contractor complain—an inference that avoids Question 3 of the Jurisdictional Statement instead of answering it.

CONCLUSION.

We submit that the Argument under Points III and IV of Appellee's Motion to Dismiss does not eliminate the need for consideration of the federal questions therein discussed. We submit that in Points I and II of the Argument in Appellee's Motion to Dismiss the basic assumption made by Appellee is shown to be unwarranted, that the alleged comparability of the instant case and *Wood Preserving* is nonexistent and that the further argument required to establish the point made by Appellee remains a substantial federal question.

We submit that the kind of cases relied upon by the Indiana Supreme Court and Appellee to show that a common carrier is the agent for the Government in receiving the goods manufactured by Appellant for transportation to destinations outside of Indiana result in an argument erroneous in the area of general law and erroneous also in the field of constitutional law. The word, "agent" as

used in *Illinois Central R. R. Co. v. U. S.*, 265 U. S. 209, 44 S. Ct. 485, and cited by the Supreme Court of Indiana. (Appendix A, p. xii Jurisdictional Statement), is not employed as a technical term in the law of principal and agent but is a word being used generally as descriptive of the existence of a relationship between the United States and the carrier rather than between the carrier and the contractor. We further submit that the concept of agency applied with mechanical precision by Appellee or by the Supreme Court of Indiana, for a purpose other than determining liability between principal and agent, constitutes a misuse of the concept. If common carriers are to be considered agents of consignees under bills-of-lading handed to them when f.o.b. delivery is made on board their equipment, and the *International Harvester* case Class 4 rule is to apply to every f.o.b. delivery in the state of origin, that determination should be made only by this Court, and only after a full consideration of the law and the potential dangers to the meaning and continuing interpretation of the commerce clause.

We respectfully urge that Appellee's Motion to Dismiss be denied and that the Court permit briefs to be filed and oral argument to be heard on these substantial and unique federal questions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 701

APPENDIX AVIATION CORPORATION,
Appellant,

v.

INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

APPELLEE'S MOTION TO DISMISS AND SUPPORTING BRIEF

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INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,
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APPELLEE'S MOTION TO DISMISS AND SUPPORTING BRIEF

MAY IT PLEASE THE COURT:

Pursuant to Rule 16 (2) (b) of this Court, appellee in the above entitled case respectfully moves the Court to dismiss said appeal on the ground that it does not present a substantial federal question.

Opinion Below

The opinion, decision and judgment of the Indiana Supreme Court, as yet unreported officially, is unofficially

reported in 143 N. E. (2d) 91 of the West Reporter System and is fully and correctly reproduced in Appellant's Jurisdictional Statement as Appendix "A" thereto.

Jurisdiction

The federal statute which confers jurisdiction of this appeal, if this Court accepts jurisdiction, is properly stated by appellant as being found in 28 U. S. C. A. Sec. 1257 (2).

Further, the claimed invalidity of the tax imposed under the facts herein was based upon appellant's sole contention that it violates Article I, Section 8, Clause 3 of the Constitution of the United States. This single issue was raised by appellant at the inception of the case and at every stage of the proceedings.

The opinion and decision of the Indiana Supreme Court denied appellant's claim, holding that the tax was imposed upon receipts which "resulted from transactions completely performed in Indiana," the taxing state. 143 N. E. (2d) 91, 99.

However, the basis of Appellee's Motion to Dismiss is that said appeal does not present a substantial federal question because the questions sought to be presented have already been decided by prior, unaltered and substantially identical and indistinguishable decisions of this Court, so as to leave no room for real controversy.

Equitable Life Assurance Society v. Brown (1902), 187 U. S. 308, 311, 23 S. Ct. 123, 47 L. Ed. 190;

Zucht v. King (1922), 260 U. S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194;

Palmer Oil Corp. v. Amerada Corp. (1952), 343 U. S. 390, 72 S. Ct. 842, 96 L. Ed. 1022.

Constitutional Provisions and Statutes Involved

The only constitutional provision upon which appellant relies is Article I, Section 8, Clause 3 of the Constitution of the United States.

The statute involved is the Indiana Gross Income Tax Law of 1933, as amended. This statute as now amended may be found complete with all amendments to date in Burns' Indiana Statutes Annotated, 1933, Vol. 11, Part 2 (1951 Replacement), Sections 64-2601 to 64-2635 inclusive.

The levying clause of said Act as last amended by Indiana Acts of 1937, Chapter 117, Section 2, in so far as relevant to this appeal, is correctly stated on page 3 of Appellant's Jurisdictional Statement.

The exemption provided by Section 6 (a) of that Act, as quoted on page 3 of Appellant's Jurisdictional Statement, is nothing more than a recognition by the Indiana Legislature of the supremacy of the Commerce Clause of the United States Constitution, but only to the extent as so interpreted by this Court.

Questions Presented

A. Whether the appellant, manufacturing goods in Indiana as prime contractor for the United States Government, is engaged in interstate or local Indiana commerce when such goods are inspected and accepted by the United States Government at appellant's plant in Indiana, loaded at appellant's dock in Indiana by appellant upon a carrier designated by the United States Government and immediately shipped f.o.b. from said Indiana point, using a Government Bill of Lading, to points outside of Indiana designated in such bill of lading?

B. Whether the appellant, manufacturing goods in Indiana as subcontractor for corporations which are prime contractors with the United States Government, is engaged in interstate or local Indiana commerce when such goods are inspected and accepted by the United States Government at appellant's plant in Indiana, loaded at appellant's dock in Indiana by appellant upon a carrier designated by the United States Government and immediately shipped f.o.b. from said Indiana point, using a Government Bill of Lading, to such prime contractors outside of Indiana as designated in such bill of lading,—such goods being subject to acceptance by such prime contractors upon delivery at said destination outside of Indiana?

STATEMENT

Appellant, a Delaware corporation qualified and admitted to do business in Indiana, maintains an office and two manufacturing plants in St. Joseph County, Indiana. During the years in question, from January 1, 1952, to and including December 30, 1953, appellant entered into contracts with the federal government, executed at places outside of Indiana, for the manufacture of certain items needed for the armed forces. Appellant's performance of these contracts and the imposition of the tax upon the receipts therefrom form the basis for question "A" heretofore stated,—the material facts of which are hereafter set forth under division "A" of this statement.

A second class of contracts were entered into by the appellant as subcontractor with other prime contractors which had contracts with the United States Government. Appellant's performance of this second class of contracts and the imposition of the tax upon the receipts therefrom form the basis for question "B" heretofore stated,—the

material facts of which will be discussed hereafter in division "B" of this statement.

The facts in this case are embodied in an extensive stipulation of facts, which recites the fact pattern in considerable detail and includes many representative provisions of the contracts involved,—said stipulation likewise being divided so as to treat separately each of the two classes of contracts involved.

A.

Appellant's contracts in which it was the prime contractor with the United States Government had the following provisions and fact patterns which were common to all.

1. Throughout the period involved, the United States Government maintained inspection employees numbering approximately 26 at appellant's Indiana plants, which were under the supervision and control of a Government Chief Inspector and whose function was to accomplish the inspection provisions of the various contracts. The inspection process by the Government began at the receiving dock of appellant when raw materials or component parts furnished by others arrived. This Government inspection process, in varying degree of intensity from an occasional spot-check to a complete and detailed inspection of a relatively large number of partially or completely manufactured articles, once begun, continued through all steps of manufacture and preparation for shipment through the instant when the completely manufactured product, completely packed, was placed on board the common carrier by appellant. In this long continuing process the Government from time to time indicated its approval or disapproval of raw materials and component parts as

well as approval of completely manufactured items and also indicated its approval or disapproval of the materials used and steps taken in preserving, packaging, packing and marking, which were necessary before the contract obligations of appellant to produce, prepare for delivery and deliver an acceptable article could be fulfilled.

The language set forth below is typical of that used in contracts between appellant and the United States Air Force:

> "Plant of the Contractor at South Bend, Indiana, is hereby designated as the place for final inspection and acceptance by the Government of the supplies called for hereunder."

The language set forth below is typical of that used in contracts between appellant and the United States Navy:

> "Final inspection shall be made at Contractor's plant at South Bend, Indiana, by Field Inspection Service."

The language set forth below represents two (2) forms of expression to be found in contracts between the appellant and the United States Army:

> "(1) When delivery is to be f.o.b. common carrier at contractor's plant final inspection and acceptance of items will be at contractor's or subcontractor's plant and shipment will be made on Government bills of lading, by rail or truck as specified. Contractor will make delivery at the nearest rail facility if rail shipment is specified."
>
> "(2) Final inspection and acceptance will be made at contractor's plant."

2. Upon the Government's final inspection as above outlined and provided, the Government Inspector filed and

attached to each article approved by him a tag or label, Form 50C, called the "Acceptable" or "Serviceable Label," which is Exhibit E of the Stipulation.

3. After this label was attached to the article, it was packaged in conformance to the instructions and requirements of the contracts. The package was then addressed and marked showing the destination of the article. From time to time, the package and preservation of the article were inspected by breaking open a package ready for shipment. When articles were ready for shipment, the Government Inspection Officer prepared Form DD 250 (Stipulation Exhibit F), called the "Material Inspection and Receiving Report;" containing the following statement:

> "I certify that the items listed herein have been inspected by me, or under my supervision. They conform to contract and have been accepted except as noted on the reverse hereof,"

following which there is a place for the date and signature of the Inspecting Officer. Two copies of this form were attached to one of the packages of the shipment by the Inspecting Officer, after which appellant notified the common carrier designated by the Government that the shipment was ready for transportation. Upon the arrival of the common carrier's equipment at appellant's dock at South Bend, Indiana, appellant loaded the goods on the carrier and delivered the shipping papers, including the Government Bill of Lading, which had been previously prepared by Government personnel and furnished to appellant to cover the shipment.

4. The destinations of all shipments were beyond the territorial limits of Indiana. The bill of lading and shipping papers delivered to the carrier identified a destination

point outside the State of Indiana for each shipment determined by the Government by one of the following methods:

A. The destination or destinations were stated in the contract.

B. According to the contract the destinations were contained in written shipping instructions furnished to appellant in advance of preparation of the articles for shipment.

Note: In some contracts the destination or destinations of part of the articles was stated therein, and the destination or destinations of the remainder was furnished in accordance with the method B above.

A typical shipping instruction received by the appellant from the United States Government is Exhibit H to the Stipulation.

5. All items were shipped by common carrier and delivery was "to the Government, f.o.b. cars or carriers equipment at the plant" of appellant where a shipment was to be by rail or air. Where a shipment was by other means than rail or air, delivery was to the Government f.o.b. the plant of appellant.

6. In all shipments, the Government Bill of Lading was used wherein the property shipped was identified as property of the United States Government. (Stipulation Exhibit "D.")

The tax and interest imposed upon the receipts of appellant from the above described transactions in which it was a prime contractor with the United States Government and paid to the appellee were in the sum of $525,647.24.

B.

The second class of contracts involved were those in which the appellant as sub-contractor entered into contracts with other manufacturers of material for the armed forces who had prime contracts with the Federal Government. In respect to this latter class, the amount of tax and interest in controversy is $21,087.40. The procedure followed under these sub-contracts was generally the same as that followed in respect to those situations in which the appellant was the prime contractor with the Government. Government inspectors inspected and accepted the articles manufactured pursuant to said sub-contracts at appellant's Indiana plants in the same manner as indicated in division "A," *supra*, and there attached the various forms of inspection and acceptance heretofore stated. In one instance, that of Boeing Airplane Co., a representative of such company had the right to exercise surveillance and inspection at appellant's Indiana plant and did so. All of the items sold under all of the sub-contracts were delivered to the corporation with whom appellant contracted f.o.b. South Bend, Indiana, and were placed on board a common carrier's equipment by appellant in accordance with contract requirements. All shipments were made f.o.b. upon Government Bills of Lading, designating an out-of-state destination either stated in the sub-contract or by instructions from the corporation having the prime contract with the government. As in division "A," *supra*, the Government designated the common carrier and prepared all shipping documents.

There was one distinction and difference between appellant's sub-contracts with other corporations and its prime contracts with the Government, in that articles produced by the terms of the sub-contracts were subject to inspection and acceptance or approval by the buyer at destination, after

they had been inspected and accepted by the Government at appellant's plant.

In closing this Statement of facts, it may be noted that appellant has not questioned the facts as stated in the opinion of the Supreme Court of Indiana, either by its Petition for Rehearing filed with that Court or by its Jurisdictional Statement filed with this Court.

ARGUMENT

I.

The lower Court's decision is founded upon a substantially identical decision of this Court.

With respect to appellant's receipts derived as prime contractor with the United States Government, the facts herein and the decision of the Indiana Supreme Court are substantially identical in every material respect to Department of Treasury v. Wood Preserving Corporation (1941), 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188. Comparison of the two cases reveals the following factors common to each.

1. This case, as in the Wood Preserving case, is one concerning *taxation* and in each the claim of tax immunity was based upon Article I, Section 8, Clause 3 of the United States Constitution.

2. This case, as in the Wood Preserving case, involves the Indiana Gross Income Tax Law.

3. In this case, as in the Wood Preserving case, the contracts between the parties recognized that the purchaser would transport its goods to points outside the State of Indiana.

4. In this case, as in the Wood Preserving case, prior to delivery to the purchaser, the purchaser, by its agent, inspected the goods sold and accepted those which were approved.

5. In each of said cases, the sale was completed in Indiana and the buyer acquired delivery and control of the goods in Indiana.

6. In the Wood Preserving case, as in this case, the goods were loaded upon the carrier in Indiana at the seller's expense. (See Wood Preserving Corporation v. Department of Treasury (1940), 114 F. (2d) 922 at page 924.)

7. In each of said cases, the shipments were f.o.b. the seller's place of business or point of sale in Indiana so that the freight charges were not paid by the seller.

8. In each of said cases, there was a consignee designated in the bill of lading located at a point outside of Indiana.

9. In each of said cases, the seller had no responsibility to provide safe delivery to the out-of-state destination and no liability concerning what happened to the shipment after it was placed in the hands of the carrier.

10. In each of said cases, the buyer had the absolute power and right to divert the shipment to any place it might desire, including points in Indiana.

The only point of distinction and difference between the two cases is that in the Wood Preserving case the buyer (a railroad) was also the carrier of the goods purchased, whereas in appellant's case the carrier is the agent of the buyer, a distinction which is so insubstantial as to be of no legal significance, as hereinafter discussed.

We urge that the Wood Preserving case, *supra*, so resembles appellant's case that it may fairly be said to be not only controlling, but also identical in every material respect.

II.

In answer to appellant's contended distinguishment of the Wood Preserving case. Appellant is not claiming that the Wood Preserving case, *supra*, was incorrectly decided or that the same has been overruled by subsequent decisions of this Court. It expressly recognizes the current vitality of

said case and so stated in briefs filed with the Indiana Supreme Court as indicated in that Court's opinion, 143 N. E. (2d) 91, at page 97, wherein the appellant stated:

> "The Plaintiff in the instant case and the Defendant here are not in dispute over transactions of the kind which occurred in the Wood Preserving case. If, for example, items are manufactured and sold to the United States Government to be transported to a point outside the State by the Government's own conveyances and the Government then sends its own transportation equipment to South Bend to pick up the items, as for example, by military plane at our County airport, everyone would admit that the State of Indiana is entitled to collect gross income tax on the gross receipts from such sale. The example corresponds to the facts of the Wood Preserving case."

The first point of distinguishment claimed by appellant between the Wood Preserving case and its case is that in the former the buyer accepted delivery of the goods in Indiana on its own transportation equipment, whereas in appellant's case the government did not receive the goods on its own equipment but on the equipment of a common carrier. Appellant has pursued this distinction in its Jurisdictional Statement, page 20, claiming that principles of agency are "perfectly respectable" but that there is something improper in applying the rules of agency to a commerce case. It is to be noted, of course, that the rule of agency is not a mere fiction derived solely from the common law or judicial decision. Instead, the rule of agency ordinarily (as herein) is a recognition of rights and obligations arising out of contract. Appellant refers to no authority holding that the rule of agency, while applicable in commercial transactions, is not to be applied in commerce cases. Whatever a person may do himself, he may do by an agent and if, in this case, the Government chose to accept delivery by its agent, the

carrier, the sale of the goods by appellant to the Government was wholly consummated within Indiana. The Government, as in the case of corporations, can act only through agents. We attach no significance to the fact that in the Wood Preserving case the carrier's equipment belonged to the buyer. If appellant's claim is sound, then it might likewise be claimed that acceptance of the ties in Indiana in said case was ineffectual since they were accepted by a representative of the railroad and since such case involved the commerce clause.

Concerning whether the carrier was in fact the agent of the Government, reference is made to the following case. In the case of Illinois Central R. R. v. U. S. (1924), 265 U. S. 209, the Court was considering the question of whether or not the Government was entitled to reduced rates applicable to the shipment over land-grant railroads by virtue of the use of Government Bills of Lading. Justice McKenna, who delivered the opinion of the Court, posed the question in the case, at page 212, as follows:

> "The question in the case is whether, in certain shipments of property for use by the United States, title to the property passed at the place of shipment or at the place of delivery."

And at page 214, as follows:

> "* * * the title to the property passed to the United States by delivery at the initial point of shipment to the *carrier as agent*. Land-grant rates were applicable."
>
> "* * * The Government dealt with the consignors as if the property was its—dealt with the Railroad Company as if the property was its, the Government's, and, as we have seen, the Railroad Company dealt with the Government on that assumption, and the contractors dealt with it on that assumption. The

incidental regulations between it and the contractors cannot divest that ownership in the interest of the Railroad Company." (Our emphasis)

For the foregoing reasons, we believe that a buyer may accept delivery within the state of sale not only upon the buyer's transportation equipment, but also by means of the equipment of a common or contract carrier when in fact such carrier is the agent of the buyer as herein.

Another claimed distinguishment of the appellant is that it was required by its own personnel, using its own equipment, and entirely at its own expense to deliver the items manufactured on board a common carrier accompanied by shipping papers showing an out of state destination. Although it does not appear in the decision of this Court in the Wood Preserving case, 313 U. S. 62, that the seller loaded the ties upon the carrier, reference to the lower Court's opinion in Wood Preserving Corporation v. Department of Treasury (1940), 114 F. 2d 922, at page 924 discloses that the ties were loaded upon the cars of the railroad at the expense of the seller. However, since the ties were finally accepted in Indiana, delivered to the buyer in such state and the seller had no further responsibility with respect to the contract of sale, this Court in 313 U. S. 62, apparently considered the act of loading the ties upon the carrier as being not sufficiently important to consider or mention.

Appellant also places reliance upon Joseph v. Carter & Weekes Stevedoring Company (1947), 330 U. S. 422, 67 S. Ct. 815, invalidating a tax of the City of New York imposed for the *privilege* of carrying on business within the city, as applied to the business of stevedoring. Said case is a sequel to Puget Sound Stevedoring Co. v. Tax Commission (1937), 302 U. S. 90, which is reaffirmed by the Carter-

Weekes case. The Puget Sound decision relates the history of the stevedoring business, pointing out that such companies do the work formerly considered a part of the duty of the ship's crew and held that loading and unloading by such companies is necessary for interstate and foreign commerce and, therefore, that loading and unloading are a part of interstate commerce. Said decisions point out that since the tax is for the *privilege* of carrying on business within the city, such tax cannot apply to a business which is interstate, since only the Congress has the power to grant licenses to engage in interstate business. The Carter-Weekes decision points out that if such taxes were allowed, then in port cities and transportation centers larger portions of revenue could be obtained from the flow of commerce and the avoidance of such a local toll through a locality was one of the reasons for the adoption of the Commerce Clause.

It is to be noted in the Carter-Weekes decision that the Wood Preserving case is specifically mentioned and explained (330 U. S. 422 at page 431) as being a tax on a local business "by reason of the fact that the taxpayer sold and delivered its ties intrastate before transportation began, 313 U. S. at 67."

As this Court said in Adams Manufacturing Co. v. Storen (1938), 304 U. S. 307, at page 310, the Indiana Gross Income Tax Law is *not* imposed for the privilege of transacting business, since in many instances it applies to the receipt of income by persons who conduct no business. In Department of Treasury v. Ingram-Richardson Manufacturing Co. (1941), 313 U. S. 252, this Court upheld Indiana's right to impose its gross income tax upon the local activity of enameling, notwithstanding that the taxpayer was to transport the metal parts to and from Indiana stating:

> "The transportation of the metal parts to and from Indiana were but incident to that intrastate business, as was the circulation of appellant's magazine in States other than the taxing State in the Western Livestock case, supra, p. 254."

The Ingram-Richardson case is also authority for the proposition that the execution of the contracts outside of Indiana is immaterial, if the income-producing activity is local.

The appellant also cites Hughes Brothers Timber Co. v. Minnesota, 272 U. S. 469, 47 S. Ct. 170, which case holds that logs, having commenced their drive down the river for a destination in another state, are not subject to a personal property tax. There are several such cases, particularly those dealing with the movement of logs, in which the question for determination is the point of time at which the goods commenced their interstate journey. That question is important to decide for the protection of *goods* in interstate commerce from the levy of taxes and for the protection of those substantially connected with the interstate movement. In appellant's case, the tax is *not* upon the goods upon the carrier, nor upon the Government, which in fact is the interstate shipper, nor upon the carrier. We do not believe that the element of loading should obscure the basic local activity of appellant which is manufacturing and selling goods, both of which are completed *in Indiana*. Clearly the appellant is not engaged basically in the business of loading and unloading from a carrier as in the stevedoring cases.

Under the particular facts in appellant's case, the element of loading on the carrier is the only fact approaching that of a connecting link to the interstate carriage, which in reality is interstate commerce of the Government and of the

carrier. There was no activity, no obligation, in fact nothing required of the appellant to be done outside of Indiana. This being so, we refer the Court to Canton Railway Co. v. Rogan (1951), 340 U. S. 511, and Interstate Pipe Line Co. v. Stone (1949), 337 U. S. 662, which upheld the right of a state to impose a non-discriminatory gross receipts tax even on an interstate enterprise "not reaching any activities carried on beyond the borders of the state," or if the tax be fairly apportioned to business done within the taxing state. Thus, even though this Court should consider appellant to be engaged in interstate commerce, the above cases would seem to uphold Indiana's right to tax, since there is here no activity carried on by appellant outside of Indiana.

III.

Multiple taxation is not possible.

Appellant claims that its case is governed by the opinion of this Court in Adams Manufacturing Co. v. Storen (1938), 304 U. S. 307, 58 S. Ct. 913. We submit that under the facts in appellant's case the imposition of the tax complies with the test set out in the Adams decision. In that case, 304 U. S. 307 at page 311, this Court stated:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commere clause forbids. * * *"

In appellant's case, the state in which the goods are *sold* as well as that in which they are manufactured is one state, —Indiana. We do not see in what manner these goods could be subjected to the risk of a double tax burden. For one thing, the seller could not be taxed elsewhere by reason of this Court's opinion in McLeod v. Dilworth (1944), 322 U. S. 327, for the reason that appellant is through selling or has completed its selling in Indiana. Further, before leaving Indiana, title vested in the Government so that no state could tax such goods. See James v. Dravo Contracting Co. (1937), 302 U. S. 134.

IV.

Appellant's receipts as sub-contractor were in substance derived from activities substantially indistinguishable from its activities under its prime contracts. It is to be noted that not until this litigation progressed past its initial stages did the appellant attempt to make any distinction between its activities as prime contractor with the Government and those as sub-contractor under a contract with an out-of-state corporation which was the prime contractor with the Government. Its claim for refund as filed with the appellee and attached to its complaint as Exhibit A states merely the following:

> "It is the contention of the Corporation that, since it was contemplated by the parties to the contracts under which such shipments were made at the time such contracts were executed that materials called for thereby would be shipped to points outside the State of Indiana, such sales were interstate transactions and, therefore, not subject to the Gross Income Tax or World War II Bonus Tax. The taxpayer further contends that the use of government bills of lading to effect such shipments did not alter the interstate character of the transaction."

From the foregoing, it is to be noted that at *that* time the appellant was relying solely upon the idea that *mere knowledge* on the part of the seller that goods would be shipped outside of Indiana would be sufficient to engender interstate commerce immunity for the seller. Also, in its complaint, no differentiation was stated concerning the activities as prime and sub-contractor other than in paragraphs 4 and 7, which merely stated that some of its receipts were from sales of items to manufacturers, that all items were intended by the parties to be shipped to destinations outside of Indiana and designating the amount of tax involved in the prime contract activity and that involved in the sub-contract activity. Even as late as June 21, 1957, on which date the appellant filed its Petition for Rehearing with the Indiana Supreme Court, on the matter of the sub-contracts appellant merely stated:

> "10. The Court erred in ruling that the transactions involving Appellant in its capacity as a subcontractor were the same and identical to the transactions in which Appellant was a prime contractor."

Also in the Jurisdictional Statement filed with this Court, the question of the sub-contracts does not appear to be explicitly, at least not emphatically pressed except that Question No. 3 of the Questions Presented, as appears on page 5 of the Jurisdictional Statement, relates to the question of sub-contracts. On page 13 of appellant's Jurisdictional Statement is the following:

> "Question 3 is intended to preserve one additional partial defense relied upon by the State in relation to the meaning of the 'acceptance' provisions of the sub-contracts involved in this case. The argument here is very similar to that under 'inspection and acceptance' point with respect to the prime contracts."

We do not know whether to consider this statement as an admission that the two activities and the arguments respecting the same are similar or whether the statement refers to the State's argument as being similar. If the latter is intended, then the Jurisdictional Statement does not appear to present the question of sub-contracts other than to state the question.

As a matter of fact and as heretofore stated in appellee's Statement, the only distinction between the prime contracts and the sub-contracts was that in the latter the goods were by contract subject to inspection and acceptance by the out-of-state corporation which held the prime contract with the Government. However, the fact situation with respect to the sub-contracts is peculiar in the following respects. The Government knew that the work given its out-of-state prime contractor had been sub-let to the appellant and the out-of-state prime contractor also knew that the Government had knowledge that the work was being done by appellant.

The same degree of surveillance and inspection by the Government at the Indiana plant of the appellant prevailed as in the case of appellant's prime contracts. The Government made the same acceptance in Indiana and the goods were delivered, not to the out-of-state prime contractor, but to the Government in Indiana in the same manner as in appellant's prime contracts. The Government took title to the same and they were shipped on the Government Bill of Lading to the out-of-state contractor.

In short, the customer (Government) of the out-of-state prime contractor had already inspected, accepted and acquired possession and title to the goods in Indiana. These were goods for the armed forces and the importance to the Government of detecting imperfections in the goods

at the initial point of manufacture was apparent. Basically it was the *Government* whose satisfaction and acceptance were necessary.

It is not clear what circumstances would cause the out-of-state prime contractor to reject the goods when its customer (the Government) had already inspected and accepted them. It is also not clear in what manner the out-of-state contractor could reject the goods, since they were owned by the Government. Further, the record discloses no instance in which any out-of-state prime contractor ever rejected any goods or complained of them. Apparently the inspection and acceptance by the Government sufficed both for it and its out-of-state prime contractor. There is, therefore, considerable basis of similarity between appellant's prime and sub-contract activity since in each the ultimate end was to manufacture goods satisfactory to the Government.

CONCLUSION

We believe that the facts herein show that appellant's activities were essentially those of manufacturing and selling *in Indiana*. The pattern of activities clearly indicates that the Government exerted its supervision and inspection of the articles manufactured for our armed forces continuously from the initial stages; that the Government chose to complete the transaction by acceptance and delivery of the goods to it at the earliest possible moment after manufacture, purposely, for the security and defense of our country, to avoid the mishaps, delay and additional expense that might normally occur if it had received the goods in the ordinary course of interstate commerce. The effect of everything which the Government did was to

localize the transaction in Indiana. Furthe the appellant had no duty to perform or other responsibility or liability outside of Indiana.

We believe that appellant's questions have already been decided by prior, unaltered, substantially identical and indistinguishable decisions of this Court and on that basis respectfully move the Court to dismiss appellant's appeal on the basis that it does not present a substantial federal question.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 701

BENDIX AVIATION CORPORATION,
Appellant,

vs.

INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,
Appellee.

PETITION FOR REHEARING.

NATHAN LEVY,
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South Bend, Indiana,
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JAMES W. OBERFELL,
Counsel for Appellant.

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INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,

Appellee.

PETITION FOR REHEARING.

Petitioner presents its petition for a rehearing of this Court's order dated March 3, 1958, granting the motion of the Appellee for the dismissal of this appeal and in support thereof respectfully shows:

GROUNDS FOR REHEARING.

This petition, entitled in accordance with Rule 58 of the rules of this Court, represents an effort to obtain a reconsideration of the dismissal of the above captioned appeal and a full hearing with briefs and oral argument rather than the hearing afforded by the limited scope of a Jurisdictional Statement, motion and reply.

We are aware that this petition must be conceived by counsel in the darkness of our lack of knowledge of those considerations by which it was determined that the federal questions lacked substantiality. The only questions raised were federal questions and their seeming substantiality to Appellant and Appellee, their respective counsel, and the Courts below, is attested by the opinions below. With such objectivity as can be mustered by counsel for an Appellant after the dismissal of the Appellant's appeal, it is submitted that the federal questions hereinafter discussed should, with full respect, though contrary to the opinion of this Court, be characterized as substantial.

A.

The Common Carrier as Agent.

Appellant received gross income for doing all of the acts required by it under a contract with the United States of America. Until the contract was completely performed by Appellant there could be no gross receipts. Appellant in failing to fulfill the contract would, as a matter of fact, open itself to an action for breach of contract. The gross income which came to Appellant was single and undivided and arose out of the fulfillment of its total obligations under the contract. Under Indiana law, if there are no gross receipts, there is no taxable event. No "local Indiana commerce" produced gross receipts to which the gross income tax of Indiana could attach. From what did the gross receipts arise? From the fulfillment by Appellant of the totality of its obligations, including contractually, economically and physically, as an unseparated and inseparable part, the delivery of the goods on board a common carrier accompanied by shipping papers showing an out-of-state destination.

If "acceptance" (hereinafter discussed under point "B") is given the very meaning which Appellee urges, it was still true that no agent of the United States Government was present to take the goods themselves into custody and control, and the Appellant still had the obligation of getting them on board the proper common carrier accompanied by the proper shipping papers so that they would arrive at their destination outside of Indiana. If the Appellant failed to do this, there was no gross income. If the Appellant did this, there was gross income which could, under the Indiana Gross Income Tax Law be reached only by a tax levied directly upon it and unapportioned as between local and interstate acts. The tax so imposed was held invalid under earlier rulings of this Court, unchallenged by Appellee, and not set aside by this Court. This section of the petition adopts what is believed to be an erroneous interpretation of "acceptance", but nonetheless we are left with a situation in which the tax could not, under earlier decisions, apply unless the common carrier which received the goods placed upon its equipment f.o.b. the State of origin, became a mere agent of the United States by virtue either of the facts already cited or by virtue of the fact that a Government bill-of-lading was used. Is the common carrier an agent in the sense that the United States of America is transporting its own goods in the relationship of principal and agent with the carrier? If this ruling of the Supreme Court of Indiana, and this argument of the Appellee in its motion to dismiss, form any part of the basis for the actual dismissal of the appeal, then we submit that this represents an approach entirely new to constitutional considerations with respect to the position of a common carrier's relationship to its customer in interstate transactions.

No lawyer and no Judge, including the members of the Supreme Court of Indiana, could conscientiously state that

he believed as a result of his knowledge of American Constitutional Law that a common carrier would be treated as and considered as a true agent as opposed to a means, an agency, in the circumstances of the instant case. This reasoning, as adopted by the Supreme Court of Indiana, and if included as a consideration in the dismissal of the appeal, would usher in a wholly new concept and approach to the problems of state and local taxes and their validity or lack of validity in terms of the Commerce Clause. Without referring specifically to the language appearing in many earlier opinions of this Court, we feel it may be fairly said that this Court has never in any case dealing with the applicability of the Commerce Clause suggested by the merest shadow of an inference that a common carrier in its capacity as a common carrier hauling goods not for itself but for another could be considered an agent in that one necessary sense required to uphold this portion of the decision of the Supreme Court of Indiana.

The relationship established by a bill-of-lading between the shipper or consignor and the common carrier does not work to make the common carrier an agent in the law of contracts, in the law of carriers, in constitutional law or in law anywhere.

To Appellant's knowledge, no other State has attempted to impose a gross receipts or sales tax on outgoing interstate sales because of shipment made on a Government bill-of-lading or because a common carrier was deemed to be the agent of the purchaser, or because title passed to the purchaser on delivery of the goods to the common carrier, or because in its quasi-agency status the carrier "accepted" possession of the goods for the purchaser, or because of the purchaser's inspection and approval of the condition of the goods in the seller's factory. No decision of this Court has ever approved any such basis for imposition of a state tax.

To the contrary, for example, the natural gas purchased in Texas by the Interstate distributor in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, had to be processed to the purchaser's specifications in Texas before the purchaser took possession of the gas in Texas for interstate transportation out of Texas. The purchaser's "acceptance" of the gas in Texas did not convert the transaction into local, intrastate commerce.

The bulky road building machinery sold in interstate commerce in *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, was presumably tested, inspected and approved by the purchaser in Indiana before the machinery was delivered to the carrier and before burdensome transportation costs were incurred. (Anyone familiar with the Adams Company's operations in Indianapolis would know this to be true.) This Court did not even consider the factor of such inspection and acceptance or the factor of making delivery to a carrier as agent for the buyer in its opinion in that case. Those factors were apparently not then deemed relevant to the question presented, whether the transaction was in interstate commerce.

In *Gross Income Tax Division* v. *W. D. Conkey Co.*, 228 Ind. 352, 90 N. E. (2d) 805; cert. den. 340 U. S. 941, the seller shipped bookcases from Indiana in the purchaser's name as consignor to the purchaser's customers in other states. The common carrier bill-of-lading ran to the purchaser, the same as a Government bill-of-lading runs to the Government, and the carrier would have occupied the same alleged status as agent of the purchaser, yet the Indiana Court held the transaction exempt from the Indiana tax on Commerce Clause grounds, and this Court denied review by certiorari. If the federal question here is insubstantial, then it was certainly substantial in the *Conkey* case, was wrongly decided by the Indiana Court and should have been accepted for review and reversal by this Court.

The questions here presented are, therefore, most substantial and seriously affect the commerce of the country, the revenue of the state and burden imposed on the Federal Government.

The most common form of purchase and sale in America calls for the shipping formula used in these contracts, that is to say, delivery f.o.b. the point of origin on board the equipment of a common carrier designated by the buyer. Is it not appropriate to say that in the multitude of cases dealing with interstate commerce not one has ever treated of the common carrier under these circumstances as an agent of such a buyer. If it be contended that the particular question is not as broad as the foregoing question since a Government bill-of-lading was used in the instant case, then, does it not yet remain appropriate to urge the substantiality of the question since a Government bill-of-lading has never in a case involving the applicability of the Commerce Clause been considered under this fact arrangement by the Supreme Court of the United States? Not only are the particular tax funds held by the State of Indiana and sued for by this Appellant at the direction of the United States of America, as provided in the contracts, at stake, but vast future economic concerns of both our Federal and State Governments are also involved. Not only are the economic concerns of the Federal and State Governments involved but grave doubts must necessarily spring forth concerning the tax status of all commercial transactions requiring shipment f.o.b. the equipment of a common carrier.

B.

"Acceptance", a Verbal Accident.

If, in the darkness of our lack of knowledge, our groping has not touched one of the bases for dismissal of appeal in Part A, then we feel that the only remaining possible basis must be a by-product of the word, "acceptance". As indicated above, even the resolution of the meaning of "acceptance" in a manner most favorable to Appellee does not result in a taxable transaction under the Gross Income Tax Law of Indiana. The "acceptance" under this unfavorable interpretation would give title to the United States of America at a moment, at a time briefly preceding actual delivery on the common carrier, but it would not produce any gross receipts which could be taxed under the limited incidence of the Indiana law. The most that can be said for "acceptance" by the United States is that such acceptance was a condition precedent to the performance of other acts by Appellant and that the "acceptance" produced no gross income. No tax can arise until there are gross receipts; no gross receipts until delivery on board the common carrier accompanied by appropriate shipping papers.

However, the history of the word, "acceptance" in this case is worthy of a moment's reflection. It appears in the contracts in a context saying, in effect, that "acceptance" may be prior to, after, or at the time of delivery, and that it may be of the kind that would be limited to an approval of the quality and quantity of the items produced under a contract. The argument that the "acceptance" was identical to that of the "acceptance" in the *Wood Preserving* case began in the Trial Court, which found to the contrary. It continued in the Supreme Court of Indiana, which neither accepted nor rejected the position of the Appellee on this factual question. The Supreme Court of Indiana recited a

contractual paragraph and indicated that it was satisfied, but in making its ruling it did not depend upon the "acceptance" set forth in the contract at all, but upon the Uniform Law of Sales, by which title is deemed to pass at the moment of delivery, unless a contrary intention is expressed by the parties. This is to be found in the opinion of the Supreme Court of Indiana (Jurisdictional Statement, Appendix "A", p. xii):

> "The parties seem to be in substantial agreement that at the time the manufactured articles were loaded on the carriers at the Bendix plants in Indiana, title and possession passed from appellee to the Government, and all control over its movement passed from Bendix.
>
> Uniform Sales Act, Acts 1929, ch. 192, § 19, p. 628, being § 58-203, Burns' 1951 Replacement."

We readily admit that all of the facts in this case were by stipulation and that if this question of the meaning of "acceptance" in and of itself is wholly determinative of this case, that this Court, in the exercise of its discretion, could determine that it could make the decision as to the meaning of "acceptance" without argument and without briefs despite the fact that one of the Courts below found to the contrary and the other Court below mentioned but ignored rather than relied upon it.

Candidly, counsel for the Appellant felt that this matter was in and of itself of such crucial importance and so inextricably bound up with the place of a Government bill-of-lading and with delivery f.o.b. the equipment of the common carrier that the determination would not be made without the opportunity for full briefing and argument. It may be that counsel for the Appellant lack the jurisprudential sensitivity by which one may appreciate the processes determinative of whether appeals will be dismissed or be permitted to go to argument, but it was not felt that on a question so crucial and in the face of a denial

of Appellee's position by the Trial Court and an obvious avoidance of the Appellee's position by the Supreme Court of Indiana, a decision would be reached summarily that "acceptance" in the instant case, a word taken from the contracts, and "acceptance" in the *Wood Preserving* case, a word taken from the judicial decision, were identical legal twins.

Conclusion.

For the foregoing reasons it is respectfully urged that the petition for a rehearing be granted, that the order dismissing the appeal be set aside, and that the Court enter an order noting probable jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, Nathan Levy, counsel for the above named Appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

NATHAN LEVY,
Counsel for Appellant.